ACCOUNTABILITY CLAIMS IN CONSTITUTIONAL LAW

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ABSTRACT—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 scenarios 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 as a constitutional value 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 (FEMA) responds poorly to it. FEMA is an executive agency whose head may be removed at will by the President.¹ At the next election, does this feature of FEMA’s mean that voters will

punish the President more harshly for the agency’s subpar 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. 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 been compelled to address the emergency themselves (stipulating legislative ineptitude equal to the agency’s)? That is, does Congress reduce its electoral 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 frontline 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. 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. There is no limit to 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. Yes, Congress is less accountable when it

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2 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).

3 See 42 U.S.C. § 5170 (2012) (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”).


5 See, e.g., Free Enter. Fund v. Pub. Co. Accounting 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
farms out important decisions to agencies. Yes, state governments are more accountable when they are not pressed into service by their federal overseers. And yes, incumbents at all levels are more accountable when no cap exists on campaign spending.

What is more, the Court’s accountability claims are no casual asides. Rather, they are pillars of some of the most consequential holdings in 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. Congress’s (supposedly) lessened accountability when it assigns significant matters to agencies is one of the justifications for the nondelegation doctrine. That state governments are (ostensibly) more accountable when they are not federally conscripted partly accounts for the prohibition of commandeering. And that incumbents are (purportedly) more accountable when campaign spending is unfettered is one reason why expenditure restrictions are unlawful.

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 as a constitutional value but does not reject it altogether.

\[\text{laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts}; \text{ see also infra Section II.A.}\]

\[\text{\textsuperscript{6} See, e.g., Indus. Union Dep’t v. Am. Petrol. Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (“When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . ..”); see also infra Section II.B. This answer is phrased differently than the others (Congress is less accountable when it delegates, not more accountable when it does not) because of the desuetude of the nondelegation doctrine. See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000) (quipping that the doctrine “has had one good year, and 211 bad ones”).}\]

\[\text{\textsuperscript{7} See, e.g., New York v. United States, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”); see also infra Section II.C.}\]

\[\text{\textsuperscript{8} See, e.g., Citizens United, 558 U.S. at 339 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”); see also infra Section II.D.}\]

\[\text{\textsuperscript{9} See Free Enter. Fund, 561 U.S. at 498.}\]

\[\text{\textsuperscript{10} See Indus. Union Dep’t, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment).}\]

\[\text{\textsuperscript{11} See New York, 505 U.S. at 168.}\]

\[\text{\textsuperscript{12} See Citizens United, 558 U.S. at 339.}\]
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.\(^ {13}\)

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 announcing controversial constitutional rules. They are therefore not my present concern.\(^ {14}\)

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 ideologically 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.\(^ {15}\)

Unlike the other kinds of accountability, I do not bracket these rival modes of voting. Their existence, in fact, is 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 cast their ballots? At the presidential level, some retrospective voting does take place—but based on coarse-grained factors like the state of the economy, not subtler issues like specific agency actions. In direct comparative tests, retrospective voting is also dominated by prospective, spatial, partisan, and

\(^{13}\) See infra Section I.A.

\(^{14}\) See infra Section I.B.

\(^{15}\) See infra Section I.C.
demographic voting.\textsuperscript{16} At the congressional level, retrospective economic voting is even less common, 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 \textit{second-order}: races shaped by developments at other governmental levels.\textsuperscript{17} As for the states, their elections are predominantly, not just partly, second-order affairs. State legislative results correlate nearly perfectly with national trends, while scholars debate whether governors’ economic and fiscal records affect at all their showings at the polls.\textsuperscript{18}

This evidence relates to the last 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 laws, which typically attract less media coverage, is even more scant. And their lack of knowledge of individual actions is not offset by familiarity with the actions’ overall effects. Large fractions of respondents hold inaccurate views of economic growth, the unemployment rate, the budget deficit, and a host of other indicators.\textsuperscript{19}

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 trouble is that these evaluations are weakly tethered to objective reality and heavily swayed by voters’ partisan affiliations. Democratic voters tend to approve of Democratic officeholders’ records

\footnotesize{\textsuperscript{16} See infra Section III.A. 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.}

\footnotesize{\textsuperscript{17} See infra Section III.B.}

\footnotesize{\textsuperscript{18} See infra Section III.C.}

\footnotesize{\textsuperscript{19} See infra Sections III.A–C.}
(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 copartisans even when they should be, or rewarded by the opposing party’s supporters even when they deserve it.20

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 fraction 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.21

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 worse, 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.22

The Court further 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, with it, their margin of

20 See infra Sections III.A–C.
21 See infra Sections III.A–C.
22 See infra Sections III.A–C.
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 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.\textsuperscript{23}

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. The arguments’ 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.\textsuperscript{24}

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.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27}

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

\textsuperscript{23} See infra Section III.D.
\textsuperscript{24} See infra Section III.A.
\textsuperscript{25} See infra Section III.B.
\textsuperscript{26} See infra Section III.C.
\textsuperscript{27} See infra Section III.D.
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. 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.

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 focus from institutional relations to the fostering of competition. Most aspects of governmental structure do not move the accountability needle, while closer elections both have an impact and can be encouraged by the Court.

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. 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.

28 See infra Section IV.A.
29 See infra Section IV.B.
30 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).
31 See infra Section IV.C.
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, typically asserting that accountability is an unappealing value or that it cannot be achieved through elections. 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 academic discussion 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 crucial points that have been largely 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.” Similarly, Jane Schacter has observed that “[a]ccountability is . . . strikingly untertheorized” and implored “scholars [to] focus more precisely on the meaning of


998
accountability.” 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.

A. Retrospective Voting

Accountability is, at its core, a relational concept. It contemplates two parties, one of whom acts on the other’s behalf. It also requires that the party on whose behalf the other party acts be able to reward the acting 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

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35 Jane S. Schacter, Accounting for Accountability in Dynamic Statutory Interpretation and Beyond, 2 ISSUES IN LEGAL SCHOLARSHIP 2–3 (2002); see also 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.”).

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.

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. 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 prerogative to appraise incumbents’ records as they wish. The literature also tends to stress voting to the exclusion of all other steps that voters might take. 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.\textsuperscript{42}

Its proponents deem electoral accountability 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.\textsuperscript{43} 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.\textsuperscript{44}

Scholars frequently confuse electoral accountability with other democratic values,\textsuperscript{45} 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.\textsuperscript{46}

\textsuperscript{42} See 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.

\textsuperscript{43} 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").

\textsuperscript{44} See, e.g., Gersen & Stephenson, supra note 36, at 189 ("Because 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.").


\textsuperscript{46} 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.").
As this discussion suggests, retrospective voting is the key prerequisite for electoral accountability.\(^{47}\) Retrospective voting is simply voting based on the records accrued by incumbents while in office. If these records are strong, voters cast their ballots for the incumbents; if they are weak, voters throw their support to the challengers.\(^{48}\) 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.\(^{49}\)

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.\(^{50}\)) 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.\(^{51}\) And actual knowledge is generally required, not mere reliance on informational cues or shortcuts.\(^{52}\) Partisan affiliation, for example, is a valuable prompt for other types of voting, but it does not tell voters, specifically, 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


\(^{49}\) 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.

\(^{50}\) See *supra* notes 39–40 and accompanying text.


\(^{52}\) See, e.g., Somin, *supra* note 49, at 1320 (“[T]he shortcut, which certainly useful, cannot provide an adequate substitute for basic factual knowledge about politics.”).
real-world evidence, this evidence loses its ability to drive voters’
decisions.53

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 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.54

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.55

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

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53 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 (2007) (observing that in most models of retrospective voting, “the translation process requires that this objective economy is perceived by voters and perceived somewhat accurately”).

54 See, e.g., Thomas J. Rudolph, The Meaning and Measurement of Responsibility Attributions, 44 AM. POL. RES. 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.

55 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 deliberately 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.
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.

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. 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.

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56 See, e.g., Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public’s Response to Hurricane Katrina*, 70 J. Pol. 120, 121 (2008) (noting that “economic performance” is “the focus of almost every other study on [retrospective voting]”).

57 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”).

58 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*,
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.59

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.60 Nevertheless, it is

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59 See, e.g., Samuels & Hellwig, supra note 57, 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”).

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.61

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.62 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.63

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 formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas.”64

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.65 I therefore turn next from

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

62 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”).

63 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 Bernard Rosen, Holding Government Bureaucracies Accountable 209 (3d ed. 1998) (covering “an awesome armada of policies, mechanisms, and processes for overseeing government bureaucracies”).

64 Grant & Keohane, supra note 36, at 36; see also Helene V. Smookler, Accountability of Public Officials in the United States, in PUBLIC SERVICE ACCOUNTABILITY: A COMPARATIVE PERSPECTIVE 39, 41 (Joseph G. Jabbra & O.P. Dwivedi eds., 1989) (“[A]gencies are also legally accountable to the courts for the administrative observance of statutes and constitutionally granted rights and liberties . . . .”).

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—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. 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. 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.

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

legislative veto as a tool through which “Congress secures the accountability of executive and independent agencies”).

66 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.

67 See, e.g., Campbell et al., 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.”).

68 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.”).

centrality of partisanship for many voters. 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. To be sure, Michigan modelers acknowledge that partisan affiliation can change over time as voters update their “running tally” of parties’ successes and failures. 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; racial cohesion must be shown, for both minority and majority voters, to establish a violation of the Act. 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.”

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.

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


72 FIORINA, supra note 39, at 85–86.

73 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”).

74 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).

75 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).
consistency with a single theory of voting, but rather for a messy mix of reasons that stem from multiple models at once.76 It is 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.77

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. I do not comment on certain one-off arguments made by individual Justices,78 nor do I evaluate assertions that particular doctrinal rules are required by particular actors’ greater or lesser accountability.79 A last proviso: In all of the cases I examine, the Court

76 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 [sic] most elections”).

77 See infra Part III.

78 See, e.g., Dep’t of Transp. v. Ass’n of Am. R.Rs., 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”).

79 See, e.g., Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 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 Mfrs. 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
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.

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) and the directive power (the President’s authority to instruct them what to do). 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. 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.

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

80 See, e.g., Freytag v. Comm’r of Internal Revenue, 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”).
81 See, e.g., Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2298–99 (2001) (noting that President Bill Clinton’s more extensive use of the directive power changed “norms of accountability”).
82 461 U.S. 477 (2010).
83 Id. at 484.
84 Id. at 486–87.
85 See id. at 484, 486–87.
the punishment [for] a pernicious measure . . . ought really to fall.”86 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.”87 Now “the buck would stop somewhere else,” “greatly diminish[ing] the intended and necessary responsibility of the chief magistrate.”88

Justice Antonin Scalia made the same argument in his renowned 1988 dissent in Morrison v. Olson.89 He commented that, ordinarily, when the President can dismiss federal prosecutors at will, “the President pays the cost in political damage to his administration” if prosecutors abuse their authority.90 “[T]he unfairness” of the prosecutors’ conduct “will come home to roost in the Oval Office.”91 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.”92 “[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.”93

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.”94 In a 2000 dissent, similarly, Justice Stephen 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).95 Conversely, Justice Breyer asserted

86 Id. at 498 (citation omitted); 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?”).
87 Free Enter. Fund, 561 U.S. at 498, 514 (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton)).
88 Id. at 514 (quoting THE FEDERALIST NO. 70, at 478).
90 Id. at 728–29 (Scalia, J., dissenting).
91 Id. at 729; 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).
92 Id. at 729.
93 Id. at 731 (emphasis omitted).
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.” 96 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.” 97

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.” 98

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. 99

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

97 Freytag, 501 U.S. at 921 (Scalia, J., concurring in part and concurring in the judgment).
98 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 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 executive removes some ambiguity surrounding the ‘author’ of the administrative actions . . . and hence allows [voters] to reward or punish government performance.”).
99 See supra Section I.A.
elected by voters, and thus accountable to them, she should have plenary authority over the entire executive branch. 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. 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 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 William 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. 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

100 See, e.g., Free Enter. Fund v. Pub. Co. Accounting 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).

101 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) (“If 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.”).

will,” not by “politically unresponsive administrators.” 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.” “When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress . . . .”

Justice John Marshall Harlan echoed this argument in a 1963 opinion, 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.” So did Justice William J. Brennan in a 1967 concurrence, 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.” 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.”

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 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

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103 Id. at 685–87 (Rehnquist, J., concurring in the judgment).
104 Id. at 687.
105 Id.
108 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.”); see also 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 “aggrandizes[s] its primary competitor for political power, and the recipient of the policymaking authority, while not Congress itself, would at least be politically accountable”).

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left on the duties imposed on the public,” and it “obscure[s] [its] responsibility for the eventual costs and disappointments.”

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. 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. A federal statute, the Low-Level Radioactive Waste Policy Act, directed states to provide for the disposal of radioactive waste generated within their borders. 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; state officials remain accountable to the people.”

But “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”

“[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.”

Justice Sandra Day O’Connor, the author of New York, defended the same proposition in a 1982 case involving federal requirements imposed on state utility commissions. 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.”

“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.” In a 1997 case about a federal mandate that state law enforcement officers check handgun buyers’ backgrounds, the Court reasoned along similar lines. “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.”

“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.”

Outside the commandeering context, 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, 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. The plurality wrote that “[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability

\[113\] Id. at 168.

\[114\] Id.

\[115\] Id. at 169.


\[117\] Id. at 787.

\[118\] Id.


\[120\] Id. at 930.

\[121\] Id.

key to our federal system.” 

“[W]hen the State has no choice, the Federal Government can achieve its objectives without accountability.” 

Likewise, the dissenters declared that “[w]hen Congress compels the States to do its bidding, it blurs the lines of political accountability.”

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. 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. Of these two sides to the argument, I focus below on the state aspect. It is the one that is

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123 Id. at 578 (plurality opinion).
124 Id.
125 Id. at 678 (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).
126 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.”).
127 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 “interfered with the direct line of accountability between the National Legislature and the people who elect it”).
more prominent in the case law, more illuminated by the political science evidence, and more distinct from the Court’s other contentions.\textsuperscript{128}

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 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, \textit{Citizens United v. FEC}, in which it struck down the federal prohibition on independent expenditures by corporations and unions.\textsuperscript{129} The Court proclaimed that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”\textsuperscript{130} 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.”\textsuperscript{131} It also enhances “the ability of the citizenry to make informed choices among candidates”\textsuperscript{132} as well as the “[d]iscussion of public issues and debate on the qualifications of candidates.”\textsuperscript{133} Accordingly, “political speech must prevail against laws that would suppress it.”\textsuperscript{134}

Justice Kennedy, the author of \textit{Citizens United}, advanced the same argument in a 1990 case involving a state ban on corporate expenditures.\textsuperscript{135} He wrote that the ban “prevents a nonprofit corporate speaker from using its

\begin{footnotesize}
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\item The state governmental claim also differs from the presidential and congressional arguments in that it is really about the \textit{distortion}, not the \textit{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.
\item 558 U.S. 310, 372 (2010).
\item \textit{Id.} at 339.
\item \textit{Id.}
\item \textit{Id.} (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976)).
\item \textit{Id.} at 340 (quoting \textit{Buckley}, 424 U.S. at 14).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
own funds to inform the voting public that a particular candidate has a good or bad voting record.”

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.”

In a 2003 case, Justice Scalia objected to the prohibition that was later invalidated in *Citizens United* on similar grounds. “[T]his legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice.”

The law thus “mute[s] criticism of [Congress members’] records and facilitate[s] [their] reelection.”

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 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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136 Id. at 706 (Kennedy, J., dissenting).
137 Id.
139 Id. at 248 (Scalia, J., concurring in the judgment in part and dissenting in part).
140 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.”) (footnote omitted).
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.141

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 agencies, 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 agencies, state governments are forced to act by their federal overseers, or campaign spending is limited. In other words, accountability is both high absolutely in Scenario 1 and higher relative to 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.142 Instead, the Court’s analysis has been highly

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141 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 objective 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.

abstract and theoretical, “a matter of words rather than of evidence,” as Cass Sunstein once quipped.\textsuperscript{143} 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.

III. ACCOUNTABILITY ACCORDING TO THE EVIDENCE

I carry out my empirical assessment in the same way (more or less)\textsuperscript{144} 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 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”).

\textsuperscript{143} Sunstein, supra note 6, at 326 (discussing the nondelegation doctrine).

\textsuperscript{144} The exception is the Court’s campaign finance claim, whose rebuttal requires a different analytical structure. See infra Section III.D.
the Court’s claims, at least for certain voters in certain settings. These findings are why this Article discounts accountability as a constitutional value 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. 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.” 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. 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.” There is far less work on the subtler forms of accountability implicated by the Court’s claims.

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. 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

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145 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 . . . .”).

146 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.”).

147 See, e.g., Johns, supra note 58, 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 PRESIDENTIAL STUD. Q. 514, 515 (2015) (“One challenge facing observational studies . . . on responsibility attributions is controlling and measuring the information that voters encounter . . . .”)

148 Lawrence W. Kenny & Babak Lotfinia, Evidence on the Importance of Spatial Voting Models in Presidential Nominations and Elections, 123 PUB. CHOICE 439, 440 (2005); see also 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 . . . .”)

149 See supra Section II.A.
any survey that has asked voters about their knowledge of agency regulations or adjudications. 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 even mentioned each of them. Only a handful of agencies earned more extensive attention, on the order of two hundred or more annual articles each: the Environmental Protection Agency, the Federal Communications Commission, the Federal Reserve, the Food and Drug Administration, and the Securities and Exchange Commission. 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 six thousand articles mentioned the Iraq or Afghanistan wars, and almost nine thousand referred to the economy.

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. For the category of questions involving “people and parties,” “fully 62 percent . . . were answered correctly by fewer than half of those surveyed.” Similarly, Ilya Somin analyzed answers to the 200 American National Election Study (ANES), the preeminent recurring political polls.

150 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 KEEPER, 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.

151 See Ruder, supra note 147, at 530 fig.2.

152 See id.

153 See id. at 528 (noting coverage range of 1987–2007). My Lexis searches produced 6,547 hits for Iraq or Afghanistan and 8,930 hits for the economy.


155 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.
poll about voter behavior. 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.”

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.

Thanks to findings like these, in Delli Carpini’s words, “[t]here is a consensus that most citizens are politically uninformed.” 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.” 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. Without such knowledge, though, these voters cannot vote retrospectively based on agency performance.

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

161 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 150, 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”).
162 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 52 and accompanying text.
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’ 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 Ronald Reagan’s and President Bill Clinton’s terms.\footnote{Larry M. Bartels, Beyond the Running Tally: Partisan Bias in Political Perceptions, 24 POL. BEHAV. 117, 126–38 (2002).} 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.\footnote{Id. at 136.} For example, Democrats (wrongly) thought that unemployment and inflation increased during President Reagan’s tenure.\footnote{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. 3–Sept. 7, 2006) (unpublished manuscript prepared for presentation at the Annual Meeting of the American Political Science Association), https://www.princeton.edu/csdp/events/AchenBartels011107/AchenBartels011107.pdf [https://perma.cc/XG4E-YLB2] (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).} Likewise, Republicans (incorrectly) asserted that federal spending on the poor rose under President Reagan and that the crime rate went up under President Clinton.\footnote{DELLI CARPINI & KEETER, supra note 150, at 263–64.}

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.\footnote{Id. at 136.} But unlike Bartels, they then calculated the shares of these respondents who approved of the supposed spending increases and who voted for Vice President George H.W. Bush in the 1988 presidential election.\footnote{Id.} 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. 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 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 link 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 overattribute responsibility to the President, deeming her fully in charge of even independent agencies. 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. He found that there is essentially no connection between this fraction

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169 See id.

170 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 Z. Huq, Removal as a Political Question, 65 STAN. L. REV. 1, 53 (2013) (discussing these “[s]trategic response effects”); Edward H. Stiglitz, Folk Theories and Constitutional Values, Cornell Legal Stud. Res. Paper No. 16-10, at 16 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737997 [https://perma.cc/RMF9-HEGJ] [hereinafter Stiglitz, Folk Theories] (finding that the presence of the legislative veto increases gubernatorial accountability for economic performance); Stiglitz, supra note 98, at 1163–65 (finding that after the legislative veto was invalidated in Missouri, the legislature compensated for its loss by enacting more specific statutes).

171 See Ruder, supra note 147, 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
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. But she was cited in more articles (above 30%) on independent agencies like the Federal Election Commission and the Federal Reserve.

According to Ruder, this analysis “reveals one possible way that the accurate assignment of blame can be undermined by news coverage of agencies.” “[A]gencies that are relatively insulated from presidential control [can] receive a large share of articles that mention the president,” and vice versa. 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. 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. Conversely, Democrats who saw the economy as worsening tended to blame the Republican Congress for the deterioration. More discussions of agency policy.”); see also Stiglitz, supra note 98, at 1170–71 (using newspaper mentions of the governor to measure gubernatorial control over state agencies).

172 Ruder, supra note 147, at 531.

173 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). Id. at 534.

174 Id. at 532.

175 Id.

176 See, e.g., DeL Prentice & Keeter, supra note 150, 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 157, at 36 (36% of the public could name the Treasury Secretary and the Chair of the Federal Reserve in 2008).


178 Id.; see also Brad T. Gomez & J. Matthew Wilson, Causal Attribution and Economic Voting in American Congressional Elections, 56 POL. RES. Q. 271, 277 (2003) (finding that “Democrats are much
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.\textsuperscript{179} 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.\textsuperscript{180}

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’ co-partisans 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.”\textsuperscript{181} In a 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,\textsuperscript{182} tornadoes,\textsuperscript{183} college football defeats,\textsuperscript{184} even shark attacks.\textsuperscript{185} If this logic of “blind retrospection”\textsuperscript{186} 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.\textsuperscript{187}

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\textsuperscript{179} Steven P. Nawara, \textit{Who Is Responsible, the Incumbent or the Former President? Motivated Reasoning in Responsibility Attributions}, 45 \textit{PRESIDENTIAL STUD.} Q. 110, 120–21 (2015).

\textsuperscript{180} Id. at 122–24; see also Cigdem V. Sirin & José D. Villalobos, \textit{Where Does the Buck Stop? Applying Attribution Theory to Examine Public Appraisals of the President}, 41 \textit{PRESID. STUD.} Q. 334, 345–47 (2011) (reporting similar results from an experiment involving the economy and foreign policy).


\textsuperscript{184} Andrew J. Healy et al., \textit{Irrelevant Events Affect Voters’ Evaluations of Government Performance}, 107 \textit{PROC. NAT’L ACAD. SCI.} 12804, 12806 (2010).

\textsuperscript{185} Achen & Bartels, supra note 182, at 14.

\textsuperscript{186} Id. at 8.

\textsuperscript{187} 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.
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 . . . . How can voters use a single quadrennial ballot to express preferences on that enormous range of policy decisions?”

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.” Underpinning this conclusion are psychological points that have been covered already: voters “systematically misjudge the state of the economy

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 166, at 66, 69, while lower information voters are more prone to holding the President responsible for external developments, see Gomez & Wilson, supra note 178, 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.

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188 Huq, supra note 170, at 64; see also Rubin, supra note 33, at 2080 (observing that most agency “decisions are simply too fine-grained to become factors in an electoral campaign”).

189 Anderson, supra note 53, at 286.
even when it is presented to them on a silver platter,” and assign “responsibility for good performance to the party they support and blame parties they do not like for inferior economic performance.” 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 must be 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 all but one of the presidential elections from 1956 to 2000, “prospective economic items” relating to voters’ future economic expectations were “much more powerful than their retrospective counterparts.” Party identification and ideology were also stronger determinants of vote choice than the retrospective items, which were statistically significant in only three out of twelve elections. 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. Retrospective economic evaluations, though, were not.

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 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.

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190 Id. at 280.
191 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 PRESIDENTIAL STUD. Q. 467, 471 (2014) (noting that its assumptions are “highly contingent and need not hold in many situations and political contexts” (internal citations omitted)); Joel A. Middleton, What Do We Know About Economic Voting? 30 (May 2011) (unpublished Ph.D. dissertation, Yale University) (on file with Northwestern University Law Review) (“[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.”).
192 For a discussion of other modes of voting, see supra Section I.C.
194 Id. at 65.
195 Campbell et al., supra note 48, at 1092.
196 Id. For additional work in this vein, see DELLI CARPINI & KEETER, supra note 150, 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 . . . .”); LEWIS-BECK ET AL., supra note 71, at 376 (“for the typical contemporary American voter,” “more lasting factors” than economic assessments, “such as socioeconomic status and party identification, are formed first”).
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” 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 and Somin, 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,” may be as normatively troublesome as no accountability at all.

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). 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,

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197 Delli Carpini, supra note 159, at 27.
198 See Delli Carpini & Keeter, supra note 150, at 156–74.
200 Schacter, supra note 35, at 11; see also Stephanopoulos, supra note 60, 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.
201 See Ruder, supra note 98, at 313–14; see also id. at 321 (finding that coverage of the Justice Department more often has a political valence).
their attributions of presidential responsibility for the Commission’s actions do not change significantly. 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. 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. 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. For this claim to hold, the first prerequisite is that voters know about

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202 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. See id. at 329.

203 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 147, 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).

204 See supra notes 171–75 and accompanying text.

205 See supra Section 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. Eric A. Posner & Adrian Vermeule, Interring
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.\footnote{My only quarrel with Posner and Vermeule’s claim is that it is based on a normative assertion about what voters \textit{should do}, not empirical evidence about what they \textit{in fact} do. See, \textit{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 \textit{either} making decisions themselves or delegating those decisions to other bodies. 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. \textit{See} Edward H. Stiglitz, \textit{The Limits of Judicial Control and the Nondelegation Doctrine}, J.L. ECON. & ORG. 19 (unpublished manuscript) (on file with author). 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.}{206}

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.\footnote{\textit{See} supra Section III.A.1.}{207}

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.\footnote{\textit{See} Delli Carpini \& Keeter, supra note 150, at 80–81.}{208}

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.\footnote{\textit{R. Douglas Arnold, Congress, the Press, and Political Accountability} 117, 123 (2004).}{209}

And more recently, Jeffery Mondak and his coauthors reported that only slim majorities of the public could state correctly whether Congress enacted legislation on handgun sales or campaign finance during George W. Bush’s presidency.\footnote{\textit{John R. Zaller, The Nature and Origins of Mass Opinion} 76 (1992); \textit{see} also Donald R. Songer, \textit{Government Closest to the People: Constituent Knowledge in State and National Politics}, 17 POLITY 387, 388 (1984) (reporting a similar finding).}{210}

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 in delegating power—\textit{it is} accountable for its decision to delegate power to the agency,” (emphasis omitted)).
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 offered their views on all eight.211 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,212 the DREAM Act,213 the Aviation Reauthorization Act,214 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.215 Attitudes toward the DREAM Act shifted even further toward the party line, by 15–25%.216

212 Toby Bolsen et al., The Influence of Partisan Motivated Reasoning on Public Opinion, 36 Pol. Behav. 235, 244 (2014).
215 Bolsen et al., supra note 212, at 248.
216 Druckman et al., supra note 213, at 69. A related literature finds partisan differences in overall congressional approval, with Democrats tending to approve (disapprove) of Congress when it is
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.217

Stephen Bennett tracked the percentage of respondents who knew which party held more seats in the House of Representatives before and after each election from 1960 to 1984. This percentage typically hovered between 40% and 50%, though it dropped to 14% in 1980.218 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%.219 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.

controlled by Democrats (Republicans), and Republicans exhibiting the opposite pattern. See, e.g., THE LEGISLATIVE BRANCH 477–78 (Paul J. Quirk & Sarah A. Binder eds., 2005).

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

218 Bennett, supra note 146, at 427–28.

219 News Release, Pew Research Ctr., Pew Research News IQ Quiz; Well Known: Public Option, Sonia Sotomayor; Little Known: Cap & Trade, Max Baucus 7 (Oct. 14, 2009); see also, e.g., DELLI CARPINI & KEETER, supra note 150, at 76 (“Over half of those surveyed could also usually . . . say which party controlled the U.S. House and Senate.”).
At the individual level, Ansolabehere and Jones\(^{220}\) and Chris Tausanovitch and Christopher Warshaw\(^{221}\) 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.”\(^{222}\) However, respondents’ awareness of intraparty 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.\(^{223}\) 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.\(^{224}\)

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.\(^{225}\)

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

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\(^{220}\) Ansolabehere & Jones, *supra* note 211, at 586–89.


\(^{222}\) Id. at 23; see also Ansolabehere & Jones, *supra* note 211, at 587 (“Of those who did offer a judgment about how their members voted on some roll calls, the average percent right equals 72% . . . ”).

\(^{223}\) Tausanovitch & Warshaw, *supra* note 221, at 23.

\(^{224}\) Ansolabehere & Jones, *supra* note 211, 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).

\(^{225}\) As noted earlier, voters’ responsibility attributions for economic and foreign policy conditions are also skewed by their partisan affiliations. *See supra* notes 177–80 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.
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.\textsuperscript{226} 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.\textsuperscript{227} 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.”\textsuperscript{228}

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.\textsuperscript{229} Likewise, according to Raymond Duch and Randolph Stevenson, 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.\textsuperscript{230} 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.”\textsuperscript{231}

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 variables.\textsuperscript{232} The first is voters’ partisan affiliation; unsurprisingly, voters are

\begin{itemize}
\item \textsuperscript{226} Brandice Canes-Wrone et al., \textit{Issue Accountability and the Mass Public}, 36 \textit{Legis. Stud. Q.} 5, 18 tbl.1, 20, 24 & tbl.3 (2011).
\item \textsuperscript{228} Tausanovitch & Warshaw, \textit{supra} note 221, at 46.
\item \textsuperscript{229} LOCKERBIE, \textit{supra} note 193, at 82, 90; see also \textit{supra} notes 193–94 and accompanying text.
\item \textsuperscript{230} \textit{See} RAYMOND M. DUCH & RANDOLPH T. STEVENSON, \textit{The Economic Vote: How Political and Economic Institutions Condition Election Results} 72–73 (2008).
\item \textsuperscript{231} Robert S. Erikson, \textit{Economic Conditions and the Congressional Vote: A Review of the Macrolevel Evidence}, 34 \textit{Am. J. Pol. Sci.} 373, 375 (1990); see also Owen G. Abbe et al., \textit{Agenda Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior}, 56 \textit{Pol. Res. 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, \textit{Ambivalence, Information, and Electoral Choice}, 99 \textit{Am. Pol. Sci. Rev.} 169, 175 (2005), or those who are more politically sophisticated, see Gomez & Wilson, \textit{supra} note 178, at 279.
\item \textsuperscript{232} \textit{See}, e.g., Matthew K. Buttime & Walter J. Stone, \textit{Candidates Matter: Policy and Quality Differences in Congressional Elections}, 74 \textit{J. Pol.} 870, 875 (2012) (referring to party identification,
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.”233 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.”234 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.235

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.236 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


233 Ansolabehere & Jones, supra note 211, at 592; see also GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 146–47 (9th ed. 2016) (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 ELECTORAL STUD. 708, 711 (2013) (finding that “93.9% of all voters voted for the candidate from their own party” in the 2010 House election).

234 Shor & Rogowski, supra note 69, at 24; see also, e.g., Ansolabehere & Jones, supra note 211, 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. 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. RES. 1019, 1031 (2011) (same in Senate elections).

235 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).

236 See, e.g., David Schleicher, Federalism and State Democracy, 95 TEX. L. REV. 763, 773 n.39 (2017) (noting that elections are second-order when “voters use preferences developed in relation to 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.

1038
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 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.237 This was a time of "extraordinary public concern about the issue," during which it paid to be tough on crime.238 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.239 These more influential matters tended to be ones that attracted more media coverage and as to which Congress was more evenly divided.240

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.241 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.242 And still more recently, Gary Jacobson243 and Brendan Nyhan and his coauthors244 found that House incumbents were punished for voting for items on President Obama’s

237 Canes-Wrone et al., supra note 226, at 18, 22.
238 Id. at 20.
239 Bovitz & Carson, supra note 227, at 300–01.
240 Id. at 303; see also Tausanovitch & Warshaw, supra note 221, at 46 (finding “a relatively modest relationship between the roll call positions of legislators on important votes and citizens’ vote choice”).
241 Ansolabehere & Jones, supra note 211, at 591.
242 Id.
244 Nyhan et al., supra note 234, at 856–57.
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. At the individual level, survey respondents were about five points less likely to vote for them if they backed Obamacare.

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 were a binding rule. The available evidence indicates that congressional incumbents would sometimes be held accountable for this atypical activity.

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. 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

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245 Jacobson, supra note 243, at 49.
246 Nyhan et al., supra note 234, at 856–57.
247 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 225. 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).
248 See supra Section II.C.
governments than for the President or Congress\textsuperscript{249}, 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.\textsuperscript{250} 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.\textsuperscript{251} 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.\textsuperscript{252} 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%).\textsuperscript{253}

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 “[l]ittle media attention” given to state governments combines with the presence of “uncompetitive political environments” to “create unfavorable conditions for accountability in many states.”\textsuperscript{254}

\textbf{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

\textsuperscript{249} Kevin Arceneaux, \textit{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.”).

\textsuperscript{250} Delli Carpini & Keeter, \textit{supra} note 150, at 151 (reporting a correlation of 0.74).

\textsuperscript{251} \textit{Id.} at 149 tbl.4.2. 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. \textit{Id.}


\textsuperscript{253} \textit{See} Songer, \textit{supra} note 209, at 393; \textit{see also} Steven Rogers, \textit{Electoral Accountability for State Legislative Roll Calls and Ideological Representation}, 111 AM. POL. SCI. REV. 555, 557 (2017) (noting that state legislative elections receive less than one-fourth of the media coverage of congressional elections).

\textsuperscript{254} Rogers, \textit{supra} note 253, at 557.
which he informed his subjects about either an expansion or a contraction of a state’s Medicaid program. 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. Republican subjects’ views swung even further toward the stances of Republican elites.

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, which was associated with President George W. Bush and the Republican Congress. Conversely, Democrats’ and Republicans’ state economic evaluations were nearly identical in states with Republican governors. 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.

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 government.

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256 Id.

257 Id.; see also Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 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).


259 Id.
legislature than which party held a majority in Congress. 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.” 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.”

As to partisanship, both Lonna Atkeson and Cherie Maestas and Neil Malhotra and Alexander Kuo 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. 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. In place of President Bush, Republicans were much more likely than Democrats to fault Louisiana Governor Kathleen Blanco and New Orleans Mayor Ray Nagin (both Democrats).

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

260 Rogers, supra note 252, at 4–5; 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”).

261 Fred Cutler, Whodunnit? Voters and Responsibility in Canadian Federalism, 41 CAN. J. POL. SCI. 627, 638 (2008) (surveying respondents in Ontario and Saskatchewan). It is unfortunate that an analogous American study has not been conducted.

262 Johns, supra note 58, 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. PSYCHOL. 731, 743–44 (2006) (finding that voters’ responsibility attributions have little impact on their voting decisions in state and federal elections).


264 Malhotra & Kuo, supra note 56.

265 Atkeson & Maestas, supra note 263, 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 Democrat-run state government for failing to ask for enough help).

266 Malhotra & Kuo, supra note 56, at 127.

267 Id.
for 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. 

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. Likewise, state legislative results were largely unaffected by states’ economic growth rates, standardized test scores, and crime rates from 1972 to 2010. 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. And at the state legislator level, out of thirty bills that both representatives and the public voted on from 1998 to 2014 (because they doubled as referenda), twenty-six had no perceptible impact on representatives’ subsequent vote shares.

As with the Court’s congressional accountability claim, see supra note 205, 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, 1063 (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) (arguing that citizens who care about public affairs can discern which governmental body is responsible for a particular regulation). 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.

Rogers, supra note 252, at 5–6.

Id. at 13–15.

See id. at 20; see also id. at 24 (confirming this result with New Jersey survey data from 1973 to 2007).

See Rogers, supra note 253, at 568–69 & tbl.6; see also id. at 560–61 (finding that a one standard deviation increase in a state legislator’s ideological extremism reduces her vote share by only 0.7%).
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 prevailing economic conditions” nationwide. 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. 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.”

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. 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. Similarly, in gubernatorial elections, Atkeson and Randall Partin and Richard Niemi and his coauthors both showed that evaluations of the state economy are typically less influential than other forms of first-order voting.


273 Lonna Rae Atkeson & Randall W. Partin, Economic and Referendum Voting: A Comparison of Gubernatorial and Senatorial Elections, 89 AM. POL. SCI. REV. 99, 100 (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.”).


275 Brown, supra note 258, at 606.

276 See supra Sections III.A.4, III.B.4.

277 Bradford H. Bishop & Rebecca S. Hatch, Perceptions of State Parties and Voting in State Elections 25 (2011) (unpublished manuscript) (on file with author); see also Rogers, supra note 252, at 20 tbl.4, 24 tbl.5.

278 Atkeson & Partin, supra note 273, at 104 tbl.2.

279 Niemi et al., supra note 274, at 952–53.
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 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.280 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.281 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,282 that four of thirty bills had measurable electoral consequences,283 and that extreme incumbents suffer at the polls compared to their more moderate peers.284 Likewise, at the gubernatorial level, recent

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281 See Cutler, supra note 261, at 645; see also Johns, supra note 58, at 66 (finding that “[e]ducation, political knowledge, and willingness to vote are all associated with” more accurate responsibility attributions).

282 Rogers, supra note 252, at 20 tbl.4.

283 Rogers, supra note 253, at 568.

284 Id. at 556; see also Birkhead, supra note 272, at 70.
studies agree that states’ economic conditions affect governors’ electoral performances, and the same may also be true of governors’ fiscal records and responses to natural disasters. 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.

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. 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.

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285 See supra note 274 and accompanying text.
288 See supra Section 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 140, at 1072 (advancing the claim with respect to all “[c]ampaign finance reform measures”).
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.\textsuperscript{289} Similarly, in the most recent congressional election, incumbent House members collected an average of $1.6 million, compared to only $232,000 for their challengers.\textsuperscript{290}

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.\textsuperscript{291} Strict contribution limits on political action committees (PACs) shrank incumbents’ spending advantage by a similar amount.\textsuperscript{292} 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.\textsuperscript{293}

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


\textsuperscript{290} See Incumbent Advantage, OPENSECRETS.ORG, https://www.opensecrets.org/overview/incumbs.php?cycle=2016 [https://perma.cc/3Y8F-3AXS]. 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.


\textsuperscript{292} See Stratmann, supra note 289, at 24.

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. 294 Gross and his coauthors came to a comparable (though less dramatic) conclusion for partial public financing in gubernatorial elections from 1978 to 1997. 295

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. 296 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. 297 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. 298

The same logic holds for public financing; by reducing incumbents’ spending advantage, it erodes their electoral edge too. According to Hall, the boost that candidates receive due to incumbency falls by roughly 50% in states with generous governmental grants 299—a result confirmed by Timothy Werner and Kenneth Mayer. 300 According to Malhotra, the average margin

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297 Thomas Stratmann, Do Low Contribution Limits Insulate Incumbents from Competition?, 9 ELECTION L.J. 125, 135 (2010); see also Stratmann & Aparicio-Castillo, supra note 291, at 189–90 tbl.4 (showing the same).
299 Hall, supra note 294, at 15 (showing a decline in the incumbency advantage from 10% to 4%).
300 Timothy Werner & Kenneth R. Mayer, Public Campaign Finance and the Incumbency Advantage 17 (Mar. 31–Apr. 3, 2011) (manuscript on file with author) (showing a decline in the incumbency
of victory drops by ten to forty percentage points when a challenger accepts full public financing. These are striking outcomes, indicating, in Malhotra’s words, that “clean elections laws are . . . effective tools of enhancing competition.”

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. 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.”

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. 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.” 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.”

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 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 298, at 245, 263 (same).


302 Id. at 277; see also Hall, supra note 294, at 15 (“By funding more challengers and reducing incumbent war chests, public funding can therefore deliver large electoral effects.”).


304 Id. at 499.

305 See id. at 507.

306 Id.

307 Id. at 509. This result is confirmed at the state legislative level by Rogers’s work. Rogers, supra note 253, at 559 (finding that state legislators’ extremism has more negative electoral consequences in competitive districts).
it by (1) decreasing incumbents’ spending advantage, thereby (2) making elections more competitive, and thereby (3) increasing the prevalence of retrospective voting. Moreover, this is the case for a wide array of reforms enacted by the states: 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.\(^\text{308}\) 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.\(^\text{309}\) 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%.\(^\text{310}\) The equivalent figure for Senate challengers is 57%.\(^\text{311}\) Likewise, the impact of House incumbents’ spending on voters’ willingness to rate their ideologies is several times smaller than that of House challengers’ spending.\(^\text{312}\) 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.

\(^{308}\) See JACOBSON, supra note 233, at 143; see also Jennifer Wolak, The Consequences of Concurrent Campaigns for Citizen Knowledge of Congressional Candidates, 31 POL. BEHAV. 211, 220 tbl.1, 222 tbl.2 (2009) (same result for House candidates).

\(^{309}\) John J. Coleman & Paul F. Manna, Congressional Campaign Spending and the Quality of Democracy, 62 J. POL. 757, 772 tbl.5, 774 tbl.6 (2000).

\(^{310}\) JACOBSON, supra note 233, at 143.

\(^{311}\) Id.

\(^{312}\) Coleman & Manna, supra note 309, at 772; see also Wolak, supra note 308, at 220 tbl.2, 222 tbl.3, 225 tbl.4 (finding that challenger spending has a greater impact on voter recognition, recall, and knowledge than incumbent spending).
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.”313 The parties disproportionately deployed these funds on behalf of challengers, especially challengers in close races where additional resources might push them over the top.314 In 2003, though, Congress enacted the Bipartisan Campaign Reform Act (BCRA), which banned the solicitation and receipt of soft money.315 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 $900,000.316 This spike in incumbents’ spending advantage presumably caused a decline in both competition and accountability,317 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,318 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.

314 See McConnell, 540 U.S. 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) (unpublished manuscript prepared for presentation at the annual meeting of the Southern Political Science Association) (on file with the Northwestern University Law Review) (showing that in the absence of party limits, challengers receive 16% of their funds from parties and incumbents receive 7%).
315 See McConnell, 540 U.S. at 133–34.
317 See Stratmann, supra note 297, at 151 (“[T]his law has probably benefitted the current office holders relative to their potential challengers.”).
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. The y-axis again denotes the likelihood that voters will 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.

319 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 141. 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.
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. 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. 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.” Given this view of the electorate, it is easy

320 See supra notes 142–43 and accompanying text.
322 McConnell v. FEC, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in the judgment in part and dissenting in part), rev’d, Citizens United v. FEC, 558 U.S. 310 (2010); see also 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.”), rev’d, Citizens United v. FEC, 558 U.S. 310 (2010); Anderson v. Celebrezze, 460 U.S. 780, 797 (1983) (“[T]he vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices . . . .”)
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, between free and commandeered state governments, and so on. But as discussed at length above, this view of the electorate is inaccurate. 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. 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.” 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.” As Rubin notes, to the extent the Court’s claims prevail, the President, Congress, and state governments win clout and federal agencies

323 See supra Part III.
324 See id.
325 Rubin, supra note 33, at 2097.
326 Id.
lose it, and all incumbents are released from the constraints of campaign finance regulation.\textsuperscript{327}

Rubin’s hypothesis violates the old adage never to attribute to malice that which can be attributed to incompetence.\textsuperscript{328} 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 paens to accountability.\textsuperscript{329} In 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.

\subsection*{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.\textsuperscript{330}) 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.\textsuperscript{331}

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\textsuperscript{327} See id. Rubin does not address campaign finance regulation, so I am guessing at his position on it.
\textsuperscript{329} The only exceptions are Justice Breyer in a pair of administrative law cases, see \textit{supra} notes 95–96 and accompanying text, and Justice Brennan in a congressional nondelegation case, see \textit{supra} note 107 and accompanying text. These are quite minor opinions in the accountability canon.
\textsuperscript{330} See \textit{supra} Part III.
\textsuperscript{331} See \textit{supra} notes 303–07 and accompanying text.
}
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. 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.

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. 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. 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. 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

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332 See supra Section III.D.1.
333 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”).
335 See id. at 684.
336 See Jones, supra note 303, at 500 (also finding that demographic diversity increases accountability).
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.337

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.338 Episodic frames encouraged respondents to attribute responsibility to individual victims or perpetrators, while thematic frames prompted attributions to governmental officials or policies.339 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.”340 If television coverage became more thematic, though, “Americans might be more apt to consider society or government... responsible.”341

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.342 Similarly, several scholars have called for the creation of “accountability agencies” that would collect and

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337 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 252, at 15–16 (finding that state legislators’ extremism has more negative electoral consequences when there are more newspaper reporters covering the state government).


339 Id. at 67.

340 Id. at 16, 137.

341 Id. at 67; see also, e.g., Edwards et al., supra note 148, at 119 (finding that greater media coverage of an issue increases the President’s accountability for that issue); Maestas et al., supra note 265, 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).

342 See generally AMY GÜTMANN, DEMOCRATIC EDUCATION (1987) (discussing the importance of civic education in a democracy).
disseminate information about money in politics, public corruption, the state of the economy, and other sensitive subjects. 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.” 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. 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?

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 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 and Thomas Holbrook found that

343 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).

344 Elmendorf & Schleicher, supra note 166, at 387. Of course, information on party affiliation would facilitate partisan voting in addition to making it easier for voters to attribute responsibility.

345 Id. at 413.


347 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.”).

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, and Robert Lowry and his coauthors, 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.

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. But when the elections are held separately, “nonconcurrence . . . attenuate[s] the impact of national factors” and “focuses voters’ and candidates’ energies on local factors.” The upshot is that state and local incumbents might become more accountable for their own records if they were not on the same ballot as

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350 Lowry et al., supra note 286, at 765.

351 Duch & Stevenson, supra note 230, at 258 tbl.9.1. 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).

352 See Timothy Hellwig & David Samuels, Electoral Accountability and the Variety of Democratic Regimes, 38 Brit. J. Pol. Sci. 65, 76 (2008) (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 308, at 220, 222, 225 (finding that gubernatorial spending usually reduces voter recognition, recall, and knowledge of House candidates).

353 Samuels, supra note 38, at 427; see also Hellwig & Samuels, supra note 352, at 76.
national politicians, especially the President. Then their records might be less swamped by national trends.\footnote{354}{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.}

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,\footnote{355}{See, e.g., Atkeson & Partin, supra note 273, at 101 (“T]he governor is the second most recognized elected official, behind the president.”); Schleicher, supra note 236, at 776 (noting that mayors “are sufficiently high profile that the electorate is able to reward them for good performance”).} and there is evidence of at least some retrospective voting in gubernatorial and mayoral elections.\footnote{356}{See supra notes 280–82 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).}

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.\footnote{357}{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. 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 236, at 817 (offering a similar rejoinder).}

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.\footnote{358}{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) (unpublished Ph.D. dissertation, Rutgers University) (on file with Northwestern University Law Review).} 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.\footnote{359}{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).}

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 G. Bingham Powell and Guy Whitten, concludes that both pillars of the American system—the separation of powers and federalism—impede retrospective voting.\textsuperscript{360} Thanks to the separation of powers, voters often 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.\textsuperscript{361} 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.\textsuperscript{362} True, the extraordinary complexity


\textsuperscript{361} See DUCH & STEVENSON, supra note 230, at 72 (showing that retrospective economic voting is stronger in Great Britain than in all but one of the other countries in the study).

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.”

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). For example, agents might “pander” by enacting popular but imprudent policies rather than unpopular policies that serve the principal’s long-term welfare. Or agents might “posture” by taking needlessly bold actions, or “persist” in adhering to positions even after they have been shown to be unwise. Because of the possibility of these and other harmful behaviors, Gersen and Stephenson propose several measures through which accountability could be curbed.

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. 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.” In these situations, he would simply deem the matter nonjusticiable.

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. That its track record has been poor with respect to accountability 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. (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

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369 See Stiglitz, Folk Theories and Constitutional Values, supra note 170, at 18 (“[C]ourts might explicitly disavow functionalist motivations as the basis for interpretive stances on structural questions.”).
370 Huq, supra note 170, at 5.
371 Id.
372 See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
denotes the *congruence* of representation or policy with voters’ views.\(^{374}\))

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.\(^{375}\) 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.\(^{376}\) In earlier work, Eric McGhee, Steven Rogers, and I calculated the responsiveness of median state house members’ ideologies to shifts in voter sentiment from 1992 to 2012.\(^{377}\) We then analyzed whether a host of electoral policies—political party regulations, campaign finance laws, redistricting rules, and aspects of governmental structure—affect responsiveness.\(^{378}\) Essentially *none* of these policies had any impact.\(^{379}\) 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.”\(^{380}\) A Court that wished to heighten responsiveness would 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.\(^{381}\)

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375 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* 23–24 (2016) (considering how election law might incorporate the insights of deliberative democracy).

376 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.

377 Stephanopoulos et al., *supra* note 374, at 792–93.

378 Id. at 806–24.

379 Id.

380 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).

381 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).

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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.\textsuperscript{382} Likewise, certain types of party primaries, certain redistricting criteria, and term limits widen the divide between legislators and voters.\textsuperscript{383} 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.”\textsuperscript{384} 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.

\textsuperscript{382} Stephanopoulos et al., supra note 374, at 810–15.
\textsuperscript{383} Id. at 806–09, 813–18.
\textsuperscript{384} Gersen & Stephenson, supra note 36, at 232; see also, e.g., Merrill, supra note 110, at 2141; Siegel, supra note 268, 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 counseled, it could exercise its power of judicial review only if multiple democratic goods were threatened. 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.

385 Charles, supra note 373, at 1106.