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SUB-REGULATING ELECTIONS

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SUB-REGULATING ELECTIONS

Jennifer Nou*

The revelation that a federal judge was reconsidering the partisan nature of voter identification laws renewed important debates about the capacity of courts to adjudicate election-related disputes.¹ Chief among them were inquiries about the ability of litigants to present reliable information in judicial forums and that of judges to draw sound inferences from the evidence proffered. How much voter fraud actually exists? To what extent do identification requirements deter fraud as opposed to disenfranchise? Many election law scholars, for their part, have long abandoned the courts as an arena for answering such questions. In their view, not only are judges limited to the cramped records presented to them, but they also remain hopelessly mired in unproductive individual rights frameworks and vain searches for manageable standards, all the while cowed by potential political questions.²

Consequently, the focus has turned instead to alternative institutions that may be better equipped to adjudicate election-related disputes.³ In the

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¹ See Richard A. Posner, *Reflections on Judging* 84-85 (Harvard 2013) (“I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana’s requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”)

² See, for example, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U Pa L Rev 503, 504 (2004); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593 (2002); Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan L Rev 643 (1998); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum L Rev 1325, 1330 (1987).

³ See, for example, Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?* 121 Yale L J 1808, 1808 (2012); Heather K. Gerken and Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in Guy-Uriel E. Charles, Heather K. Gerken, and Michael S. Kang, eds, *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* 17, 26 (Cambridge 2011).

state-level redistricting context, for example, these “new institutional” proposals include shadow line-drawing entities, advisory commissions, and independent redistricting bodies.⁴ Their underlying rationales often parallel administrative law arguments in favor of delegating decisions to agencies over courts, whether on the grounds of superior legitimacy, accountability, or expertise. Familiar questions of institutional independence and design also abound.⁵ It is thus surprising that more has not been made of the intersection between election and federal administrative law, notwithstanding some already valuable inroads.⁶

Perhaps one explanation arises from the fact that administrative efforts at the federal level have thus far been timid and, as a result, there have been few circumstances in which to apply administrative law principles directly.⁷ Last Term’s decision in *Arizona v. The Intertribal Council of Arizona*, however, helps to highlight the need for more robust theories of federal election administration.⁸ A central issue in *Intertribal* was whether Arizona’s attempt to require proof-of-citizenship for a federal voter registration form violated the National Voter Registration Act. The Act required that states “accept and use” the federal form. The Court resolved the statutory ambiguity to mean that states could not require the submission of materials beyond those listed on the form by the Election Assistance Commission (EAC). In reaching this determination, the Court

⁴ “New institutional” approaches, by and large, seek to “lessen the necessity of court intervention in politically sensitive election administration matters such as redistricting by harnessing politics to fix politics.” Cain, 121 Yale L J at 1808 (cited in note 3). See also Heather K. Gerken, *Getting from Here to There in Redistricting Reform*, 5 Duke J Const L & Pub Pol 1, 7-9 (2010); Christopher S. Elmendorf, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, 80 NYU L Rev 1366, 1407-12 (2005); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 Tex L Rev 837, 849-50 (1997); Note, *A Federal Administrative Approach to Redistricting Reform*, 121 Harv L Rev 1842, 1842 (2008).

⁵ Both fields, for example, search for structures and processes that can best facilitate that independence, whether through removal restrictions, salary protections, appointments qualifications and so on. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 Tex L Rev 15 (2010).

⁶ See, e.g., Adam B. Cox, *Designing Redistricting Institutions*, 5 Election L J 412, 416-17 (2006) (examining potential benefits of “centralized, federal administrative review” for partisan gerrymandering efforts); Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L J 425, 443-44 (2006) (identifying as a valuable research question a “larger inquiry concerning how the policy choices of nominally independent bodies are affected by, inter alia, the body’s structure and powers”); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 Colum L Rev 708, 748 (2006) (suggesting that the Department of Justice should be understood as “an agency charged with administering a statute” for Voting Rights Act purposes); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 Harv L Rev 95, 121-23 (2013); Richard H. Pildes, *Voting Rights: The Next Generation*, in Charles, Gerken, and Kang, eds, *Race, Reform, and Regulation of the Electoral Process* 17, 26 (cited in note 3); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 Yale L & Pol Rev 125, 135 (2009); Saul Zipkin, *Administering Election Law*, 95 Marq L Rev 641 (2012); Note, *A Federal Administrative Approach to Redistricting Reform*, 121 Harv L Rev 1842, 1843-44 (2008).

⁷ Other possible explanations include the historical path dependency of state primacy over electoral regulation, the lack of existing federal infrastructure to monitor elections nationally, as well as the weak political will to establish robust federal electoral institutions. See Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 Election L J 118, 122-23 (2007) (reviewing Roy G. Saltman, *The History and Politics of Voting Technology: In Quest of Integrity and Public Confidence* (Palgrave 2006)).

⁸ *Arizona v. Inter Tribal Council of Arizona, Inc.*, No 12-71, slip op (June 17, 2013), online at http://www.supremecourt.gov/opinions/12pdf/12-71_7148.pdf (visited Jan 10, 2013).

ignored the EAC executive director’s opinion letter concluding the same. The agency commissioners, for their part, had deadlocked on the interpretive question. In the decision’s wake, Arizona, joined by Kansas, is currently engaged in litigation against the EAC under the Administrative Procedure Act (APA).⁹

While *Intertribal* can be understood as a case about federalism, constitutional, or substantive election law, this article analyzes *Intertribal* through the lens of administrative law. In doing so, it foregrounds an otherwise background electoral administrative agency, the EAC, and uses the case as a springboard to explore broader themes relevant to federal election administration.¹⁰ In particular, it puzzles through various analytical issues that arise when courts are called upon to resolve agency deadlocks on questions of statutory interpretation. In light of such deadlocks, this article proposes an institutional understanding of *Skidmore* deference to interpretive documents prepared by politically insulated actors within election-related administrative agencies.¹¹ Judicial deference, it posits, should give weight to the relative independence of agency staff when politically appointed officials are otherwise deadlocked. To be clear, the claim is not that staff opinions and other guidance documents would *require* deference or overrule those of appointed commissioners. Rather, the argument emphasizes that such views constitute an oft-overlooked source of expertise that would be prudent for judges to consider in electoral disputes.

This approach would help to vindicate otherwise under-enforced constitutional norms by flipping the conventional wisdom granting greater interpretive deference to more politically accountable actors — in situations where such actors have failed, on partisan grounds, to resolve a statutory ambiguity themselves. In this manner, the proposal is a second-best solution for courts required to resolve a statutory ambiguity when first-best answers are unavailable due to institutional constraints and internal agency politics. As such, the proposal seeks to create greater incentives for internal agency independence in the presence of partisan deadlocks, as well as for the development of agency expertise through sub-regulatory materials —

⁹ See *Kobach v. The United States Election Assistance Commission*, 13-cv-04095 (D Kan 2013).

¹⁰ The sphere of election administration, as defined here, includes the administration of statutes related to the conduct of elections, including the regulation of activities leading up to an election as well as those that occur on Election Day itself — a scope that parallels that of many administrative agencies abroad. See Part 0.A. Others have adopted narrower definitions, but usually to address a different set of issues than those pursued here. See, for example, Daniel P. Tokaji, *Teaching Election Administration*, 56 St Louis U L J 675, 675 (2012) (citing “voting technology, voter registration, voter identification, and the conduct of recounts” as representative election administration issues); David Schleicher, *From Here All-The-Way-Down or How to Write a Festschrift Piece*, 48 Tulsa L Rev 401, 406 (2013) (defining “election administration” in terms of the “plumbing of the electoral system — vote counting, manning the polls, locating polling places, etc.).

¹¹ See *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944).

non-binding, but informative, guidance documents such as agency manuals, advisory notices, or opinion letters.¹²

To develop these ideas, Part I critically examines *Intertribal*'s background and reasoning. Part II surveys federal election-related agencies and notes that many are structured to deadlock on partisan grounds. Part III then considers how courts should treat reviewable election agency deadlocks, and in particular, how judges can benefit from agency expertise to resolve such ties. Finally, Part IV reflects more broadly on how administrative law principles might be tailored to the electoral context.

I. *INTERTRIBAL*'S IMPASSE

In December 2005, the Arizona Secretary of State's office sent an email to the EAC with an inquiry. The year before, Arizona voters had passed a ballot initiative requiring that voting registrants provide proof of their citizenship.¹³ Acceptable proof under the new state law included the applicant's birth certificate or passport, naturalization papers, or driver's license number.¹⁴ The Secretary of State asked whether the EAC could add this new Arizona requirement to the federal mail-in registration form that the EAC had developed under the National Voter Registration Act (NVRA).¹⁵ The federal form contained a section of state-specific instructions notifying state residents of what additional information they had to provide in order to register.¹⁶

The agency's Executive Director refused Arizona's request.¹⁷ His letter reasoned that the NVRA mandates that states "shall accept and use the mail voter registration application prescribed by the [EAC]."¹⁸ Accordingly, the new Arizona requirements did not alter the state's voter qualifications, but rather constituted an additional evidentiary requirement for a preexisting qualification (citizenship). Such a state-imposed requirement on the federal form would effectively result in Arizona's refusal to "accept and use" the EAC's form as required by the NVRA.¹⁹ In the director's view, states could not condition voter registration on the

¹² See Mary Whisner, *Some Guidance About Agency Guidance*, 105 L Library J 385, 392 (2013) (characterizing "sub-regulatory guidance" as including "agency manuals, advisory notices, internal guidance to agency field inspectors, and letters from government officials to regulated entities.")

¹³ Ariz Rev Stat Ann § 16-166(F) (2006).

¹⁴ Ariz Rev Stat Ann at § 16-166(F)

¹⁵ 42 USC § 1973gg-2(a)(2).

¹⁶ See *National Mail Voter Registration Form*, *3-20, online at <http://www.eac.gov> (visited Jan 10, 2014)

¹⁷ Letter from Exec Dir Thomas Wilkey to Sec of State, Jan Brewer (Mar 6, 2006).

¹⁸ 42 USC § 1973gg-6(a)(1)(B) (emphasis added).

¹⁹ 42 USC § 1973gg-4(a)(1).

submission of materials beyond those exclusively demanded by the federal form. The NVRA “regulated the area” and therefore preempted the state’s conflicting requirements.²⁰

Despite this opinion letter, Arizona’s Secretary of State rejected the director’s interpretation and continued to enforce the state law to require the submission of proof-of-citizenship along with the federal form.²¹ The conflict continued in both the agency and the courts. In May 2006, a consolidated group of plaintiffs, including private individuals, Indian tribes, and nonpartisan advocacy groups filed suit in district court to enjoin various practices under the state law. The Ninth Circuit granted the plaintiffs’ emergency interlocutory injunction, only to later have the injunction vacated by the Supreme Court in *Purcell v. Gonzalez*.²² In a per curiam opinion, the Court emphasized the imminence of the then-upcoming election and the Court of Appeals’ failure to defer to the findings of the district court (which had not yet issued any factual findings and, as a result, left the Supreme Court with nothing more than a “bare order” to review).²³ After further litigation,²⁴ a three-judge panel and the Ninth Circuit sitting en banc eventually held that the NVRA preempted Arizona’s conflicting law under the Elections Clause; Arizona could not require the submission of proof-of-citizenship along with the federal registration form. The Supreme Court granted certiorari.²⁵

As the case was winding its way to the Court, the EAC’s four commissioners considered the legal matter in July 2006. Their deliberations resulted in a debilitating tie: two commissioners (Democratic nominations) voted against the change and two (Republican nominations) voted in favor.²⁶ Because the proposal required three votes for approval,²⁷ the federal form was not amended. Two of the commissioners released public

²⁰ 42 USC § 1973gg-4(a)(1).

²¹ State Petitioners’ Brief on the Merits, *Arizona v Inter Tribal Council of Arizona, Inc*, No 12-71, *20 (June 17, 2013).

²² *Gonzalez v Arizona*, 485 F3d 1041, 1046 (9th Cir 2007); *Purcell v Gonzalez*, 549 US 1 (2006) (per curiam).

²³ *Gonzalez*, 549 US at 5–6.

²⁴ On remand, the appellate court affirmed the district court’s initial denial of a preliminary injunction and held that the NVRA did not supersede Arizona’s state law. 485 F3d at 1049–51. The trial court therefore granted summary judgment to Arizona.

²⁵ 568 U.S. __ (2012).

²⁶ See Office of Representative Nancy Pelosi, Press Release, *Daschle, Pelosi Announce Nominations to Election Assistance Commission* (May 28, 2003), available online at <http://pelosi.house.gov/sites/pelosi.house.gov/files/pressarchives/releases/prDachlePelosiEAC052803.htm> (visited Jan 14, 2014) (announcing nominations of Ray Martinez and Gracia Hillman by Democratic House and Senate leaders); US Election Assistance Commission, Certification, *In the Matter of Arizona Request for Information* (July 31, 2006), available online at http://archives.eac.gov/voter/docs/az-tally-vote.pdf/attachment_download/file (visited Jan 10, 2014); Joint Appendix, *Arizona v Inter Tribal Council of Arizona*, 2012 WL 6198263, *222–42 (2012).

²⁷ 42 USC § 15328.

statements regarding the basis for their votes, underscoring the contentiousness of the outcome.²⁸

After the agency’s deadlocked vote, Arizona took no further action with respect to the EAC — a fact Justice Scalia later emphasized at oral argument and in his eventual majority opinion.²⁹ Justice Scalia agreed with the Ninth Circuit that the NVRA’s “accept and use” provision precluded state-imposed registration requirements without EAC approval. On the one hand, Congress could preemptively regulate how federal elections were conducted under the Elections Clause; in this sense, the so-called presumption against preemption did not apply. Rather, Congress’ power under the Election’s Clause was broad. Its substantive reach extended over the “times, places, and manner” of federal elections — “comprehensive words” which “embrace authority to provide a comprehensive code for congressional elections,” including regulations over federal voter registration.³⁰

On the other hand, the Court also made clear that states retained the power to determine *which* voters were qualified to vote, potentially limiting previous case law regarding the scope of Congress’ ability to determine voter qualifications.³¹ How and where to draw this line — between a substantive qualification and a mere procedural regulation over the “manner” of federal elections subject to federal oversight — will almost surely be the subject of future litigation. One argument left open to Arizona on this question (but raised too late in the case) was that the state’s proof-of-citizenship registration requirement was itself a qualification to vote.³²

Justice Scalia suggested another possibility as well: that the state’s authority to establish voter qualifications also included the power to demand the information required for the state’s effective enforcement of its own qualifications.³³ Pointing to another NVRA provision declaring that the EAC-prescribed application “may require only such identifying

²⁸ Commissioner Ray Martinez, III, a Democratic nominee, argued that reversing the agency’s previous legal position regarding the NVRA would create inconsistencies and confusion in other states and was, in any event, premature given the likelihood of pending judicial resolution. Finally, he worried about the EAC’s institutional credibility. Until this vote, the EAC commissioners had always been able to achieve unanimity, and he feared that the outcome would be perceived as an “overly partisan federal agency that is more prone to deadlock” than to fulfilling its mission. Joint Appendix, 2012 WL 6198263 at 229-39.

Commissioner Paul DeGregorio, the EAC chairman and a Republican nominee, expressed his agreement with a district court opinion considering the issue and concluded that Arizona’s attempt to require proof-of-citizenship did not violate the NVRA. Id at 223. He cited his own personal experience as an election administrator in recounting registration applications that could not be finalized due to voters’ failure to supply missing information. Thus, “leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a ballot.” Id at 224–25. In his view, consolidating the federal and state requirements into one form would be more efficient and increase the number of validly cast ballots.

²⁹ *Inter Tribal Council*, No 12-71, slip op at 16–17.

³⁰ Id at 16-17.

³¹ Id at 13. See, for example, *Oregon v Mitchell*, 400 US 112 (1970).

³² *Inter Tribal Council*, No 12-71, slip op at 15 n 9.

³³ Id at 15.

information” as is “necessary” to determine “eligibility,”³⁴ Justice Scalia suggested that the statute might be read to require the inclusion of information essential to meaningful enforcement. In this manner, he effectively encouraged Arizona to bring suit (which it did) arguing that the EAC had a “nondiscretionary duty” to include citizenship information as “necessary” to enforce Arizona’s voter qualifications.³⁵ EAC’s inaction on or arbitrary rejection of the claim would then be subject to judicial review under the APA.³⁶ In a footnote, Justice Scalia further noted that the EAC lacked any active commissioners at the time, and wondered whether a court could compel agency action despite the agency’s lack of leadership.³⁷

For Justices Thomas and Alito, in dissent, the questions raised by *Intertribal* did not need to be resolved in administrative forums like the EAC, but rather could and should be settled in courts without bureaucratic involvement. Justice Alito, for his part, accused the majority of “send[ing] the State to traverse a veritable procedural obstacle course.”³⁸ Justice Thomas agreed.³⁹ Both Justices then took pains to point out that the EAC at the time was plagued by vacancies, with the lack of a quorum rendering the commission but an “empty shell.”⁴⁰

Intertribal can thus be seen as an attempt by the majority to shift back to an administrative agency, rather than a court, questions it thought better suited for an initial administrative determination. Among them: What kind of scheme — attestation backed by perjury prosecutions or formal documentation — is “necessary” for legitimately establishing voter eligibility? What kind of information would properly “effectuate” a citizenship requirement? Answers to such questions would require data and evidence that agencies would be better situated to gather relative to judicial forums, subject to the constraints of administrative law.

³⁴ Id at 12, 15–17.

³⁵ Id at 16–17.

³⁶ *Inter Tribal Council*, No 12-71, slip op at 16–17.

³⁷ Id. at 17, n. 10.

³⁸ Id at 6 (Alito dissenting).

³⁹ *Inter Tribal Council*, No 12-71, slip op 16–17 (Thomas dissenting) (“Offering a nonexistent pathway to administrative relief is an exercise in futility, not constitutional avoidance.”).

⁴⁰ Id at 17 (Thomas dissenting); id at 6 (Alito dissenting). Concurring in the judgment, Justice Kennedy wrote separately to emphasize his view that the presumption against preemption should play no less of a role in the electoral context. Id at 1–2 (Kennedy concurring). To him, the cautionary presumption played an important part when interpreting a federal statute’s boundaries and the Elections Clause was no different than other enumerated powers like the commerce or bankruptcy power, where the presumption still applied. Justice Kennedy also made a pragmatic observation: States largely bear the expenses of holding federal elections, since state and federal election processes usually overlap in practice. The same voters usually use the same ballots, that is, when choosing both state and federal officials. As a result, states still maintained an important interest in federal elections given this administrative overlap. Id at 2.

II. ELECTION-RELATED AGENCIES

As context, American federal elections are currently administered by a patchwork of federal agencies in collaboration with state and local governments, which still bear the bulk of administrative responsibilities on the ground.⁴¹ While states are constitutionally charged with providing for the “times, places, and manner” of federal elections in the first instance, Congress has exercised its power to “make or alter” these regulations selectively — most notably in the areas of campaign finance,⁴² anti-discrimination,⁴³ ballot provision,⁴⁴ vote-counting-technology, and voter registration by both domestic⁴⁵ and overseas voters.⁴⁶ While these federal responsibilities are non-trivial, it is worth noting that they pale in comparison to the more comprehensive and centralized schemes of other countries.⁴⁷

Congress, in turn, has delegated many of these election-related responsibilities to a constellation of federal administrative agencies, notable for their structural and substantive heterogeneity. Some of these agencies,

⁴¹ See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind L Rev 113, 117 (2010) (explaining that “election administration remains mostly a matter of state law and local practice, as has been the case throughout U.S. history” and “[a]uthority is largely devolved to the fifty chief election officials in the states and to thousands of local election officials at the state and local level.”)

⁴² See, for example, Federal Election Campaign Act of 1971, as amended at 2 USC § 431 et seq. In *Buckley v Valeo*, 424 US 1 (1976), the Supreme Court assumed plenary congressional power over federal election campaigns and campaign finance based on the Elections Clause. *Buckley*, 424 US at 13.

⁴³ Voting Rights Act, 42 USC § 1973 (2011).

⁴⁴ The 1975 Amendments to VRA require jurisdictions to provide ballots and instructions in language of covered language-minority groups when particular population conditions exist. A number of federal statutes concern electoral access by the disabled, including the 1982 amendment to the VRA, the Voting Accessibility for the Elderly and Handicapped Act of 1984.

⁴⁵ See National Voter Registration Act, 42 USC §§ 1973gg–1973gg-10 (2006); Help America Vote Act of 2002, 42 USC § 15301 et seq. (2002).

⁴⁶ Members of the uniformed services and U.S. citizens who live abroad are eligible to register and vote absentee in federal elections under the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA, Pub L No 99-410). Since 1942, a number of federal laws have been enacted to assist these voters: the Soldier Voting Act of 1942 (Pub L No 77-712, amended in 1944), the Federal Voting Assistance Act of 1955 (Pub L No 84-296), the Overseas Citizens Voting Rights Act of 1975 (Pub L No 94-203; both the 1955 and 1975 laws were amended in 1978 to improve procedures), and the Uniformed and Overseas Citizens Absentee Voting Act of 1986.

⁴⁷ India’s unitary election commission, for example, is constitutionally vested with broad authority over election-related matters. India Const Art 324. It has used its power to promulgate a Model Code of Conduct as well as to issue robust regulations governing the disclosure of campaign expenses, election schedules, polling and counting locations, among other matters. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L J 425, 429; Tokaji, 44 Ind L Rev at 122–23 (cited in note 41); see also Election Commission of India, *About ECI*, online at http://eci.nic.in/eci_main1/the_setup.aspx (visited Oct 16, 2013). Similarly, Canada’s single national election commission has broad authority to implement and enforce electoral legislation, including campaign finance laws; maintain a national registry of electors; oversee the registration of political parties; monitor election spending and financial returns; train election administrators; and provide technical support to independent redistricting commissions. See Jean-Pierre Kingsley, *The Administration of Canada’s Independent, Non-Partisan Approach*, 3 Election L J 406 (2004). The powers of the United Kingdom’s Electoral Commission are similarly capacious. See Elmendorf, 5 Election L J 425, 426–427 (cited in note 49); see also Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U Chi L Rev 769, 780–86 (2013) (surveying non-American institutional models of election administration).

for example, have traditionally independent features such as for-cause removal restrictions and multi-member boards, while others are more recognizably executive in nature through at-will removal of their agency heads by the President.⁴⁸ At the fore, these agencies include the EAC involved in *Intertribal*, the Federal Election Commission, the Department of Justice and the Department of Defense.⁴⁹

A. Independent Commissions

More specifically, the EAC and the Federal Election Commission (FEC) are both independent agencies with a distinctive design feature: both are normally headed by an even number of commissioners with staggered terms, equally split between two political parties in practice. Specifically, the EAC usually consists of four members, two of whom are Republicans and two of whom are Democrats.⁵⁰ Each serves four-year staggered terms.⁵¹ The EAC commissioners, in turn, choose a chair and vice chair, who also cannot be from the same political party.⁵² The FEC is similarly composed of six members with six-year staggered terms, no more than three of whom can be affiliated with the same political party.⁵³ The FEC

⁴⁸ See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex L Rev* 15, 38-39 (2010).

⁴⁹ Other agencies are tangentially involved in federal election regulation, but this article focuses on the four mentioned here. While the FEC takes the lead on campaign finance enforcement and administration, for example, it coordinates with a number of other federal agencies as well and refers criminal prosecutions under FECA to the Department of Justice. In addition, the Department of Treasury oversees public funds disbursement for presidential candidates certified by the FEC as statutorily eligible, while the Internal Revenue Service reviews FEC regulations for consistency with the tax code, determines whether an organization's tax status is consistent with its political activities as well as which political activities result in taxable income. Finally, the Federal Communications Commission also oversees broadcaster compliance with the provision of reasonable access to broadcast time for federal candidates. See Maurice C. Sheppard, *The Federal Election Commission: Policy, Politics, and Administration*, 61-63 (UPA 2007).

⁵⁰ See 42 USC § 15323(a) (specifying that members drawn from recommendations submitted by “the Majority Leader of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, and the Minority Leader of the House of Representatives . . . with respect to each vacancy on the Commission affiliated with the political party of the Member of Congress involved”); see also Tokaji, 28 *Yale L & Pol Rev* at 134 (cited in note 6). (“Bipartisan by statute, the EAC includes two commissioners from each of the major parties.”).

⁵¹ See 42 USC § 15323(b)(1).

⁵² See 42 USC § 15323(c) (“The Commission shall select a chair and vice chair from among its members for a term of 1 year, except that the chair and vice chair may not be affiliated with the same political party.”)

⁵³ See 2 USC § 437c(a)(1) (providing that “[n]o more than 3 members of the [Federal Election] Commission appointed under this paragraph may be affiliated with the same political party.”); 2 USC § 437c(a)(2)(A) (2006) (specifying six FEC commissioners with six-year terms). No independent or member of a third party has ever been appointed. See Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 *Election L J* 145, 158 n 97 (2002). Interestingly, lower courts have implied for-cause protection for the FEC. See *FEC v NRA Political Victory Fund*, 6 F3d 821, 826 (DC Cir 1993).

commissioners also choose a chair and vice chair from different political parties.⁵⁴

1. *Election Assistance Commission.* — In addition to its four commissioners, the EAC is also statutorily authorized to have an executive director, a general counsel and other professional staff.⁵⁵ The Help America Vote Act (HAVA) also created three representative advisory committees called the Technical Guidelines Development Committee, Standards Board, and the Board of Advisors.⁵⁶ As a substantive matter, HAVA granted the EAC the authority to disburse payments to states to replace voting systems as well as to provide guidance regarding voting system standards, testing, and certification. More generally, the statute directs the EAC to serve as a “clearinghouse” for election administration data and best practices.⁵⁷ HAVA explicitly denies the EAC authority, however, to issue any rules or regulations under the statute,⁵⁸ except in the narrow context of the mail-in voting process at issue in *Intertribal*.⁵⁹ The Attorney General, in turn, is authorized to enforce the statute and bring suits for declaratory or injunctive relief accordingly.⁶⁰

2. *Federal Election Commission.* — Apart from its six commissioners, the FEC also has a staff director and general counsel appointed by the commission, an inspector general, a chief financial officer, as well as a chief information officer.⁶¹ Substantively, the FEC administers the Federal Election Campaign Act (FECA), which imposes caps on election spending, limits individual candidate contributions, and requires

⁵⁴ See 2 USC § 437c(a)(5) (“The Commission shall elect a chairman and a vice chairman from among its members . . . for a term of one year . . . The chairman and the vice chairman shall not be affiliated with the same political party.”).

⁵⁵ 42 USC § 15324.

⁵⁶ The Technical Guidelines committee is chaired by the director of NIST and 14 other members appointed jointly by NIST and the EAC. The Standards Board has 110 members, 55 of whom are chosen by state chief election officers and the other half by local election officials. Finally, the Board of Advisors has 37 members drawn from state and local government associations, the Architectural and Transportation Barrier Compliance Board, and other federal agencies and congressional committees with election oversight responsibilities. See Election Assistance Commission, *Board of Advisors*, online at http://www.eac.gov/about_the_eac/board_of_advisors.aspx (last visited Jan 14, 2014).

⁵⁷ See 42 USC §§ 15322; Vassia Gueorguieva, *Election Administration Bodies and Implementation Tools*, 13 Geo Pub Pol Rev 95, 103 (2008); Ray Martinez III, *Is the Election Assistance Commission Worth Keeping?* 12 Election L J 190, 191 (2013) (“Unlike most federal independent agencies, the EAC was created as a non-regulatory body, designed primarily to serve as a national clearinghouse of election administration best practices and to distribute federal funds to state and local jurisdictions.”).

⁵⁸ 42 USC § 15329 (“The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under [the mail-in voter registration form provision].”).

⁵⁹ See 42 USC § 1973gg-7(a).

⁶⁰ 42 USC § 15511.

⁶¹ See 2 USC 437c(f); Federal Election Commission, *FEC Offices*, online at <http://www.fec.gov/about/offices/offices.shtml> (visited Dec 4, 2013); Sheppard, *The Federal Election Commission* at 63–64 (cited in note 49).

various candidate and political action committee disclosures.⁶² The Commission administers the provisions through both rulemaking and adjudication and facilitates enforcement actions in conjunction with the DOJ.⁶³ The FEC also periodically issues advisory opinions, which are generated in response to requests by parties, candidates, and other potentially regulated entities.⁶⁴

Formal agency action for both the EAC and FEC, in turn, normally requires the bi-partisan majority approval of the agencies' commissioners. The FEC, for its part, requires a majority of commissioners to agree when making, amending, or repealing rules; issuing advisory opinions; or approving enforcement actions.⁶⁵ This requirement usually requires the assent of four of the FEC's six commissioners.⁶⁶ The EAC, in turn, requires three-member approval for its actions — typically a majority of its four commissioners.⁶⁷ When coupled with the agency's partisan balancing requirements, these voting rules help to ensure that the agencies deadlock in the absence of bipartisan agreement. Moreover, a tie-vote for the FEC and EAC means that the proposed action does not proceed. By contrast, a tie-vote for the International Trade Commission (one of the only other rulemaking agencies with an even-numbered, bipartisan commission structure) means that an investigation proceeds.⁶⁸ As such, both the FEC and EAC are structurally biased in favor of the status quo.⁶⁹

⁶² See Gueorguieva, 13 Geo Pub Pol Rev at 96–97 (cited in note 57); Sheppard, *The Federal Election Commission* at 60 (cited in note 49).

⁶³ 2 USC § 437d(a)(8). See Gueorguieva, 13 Geo Pub Pol Rev at 100 (cited in note 57).

⁶⁴ 2 USC § 437f.

⁶⁵ See 2 USC § 437c(a)(2)(c) (“All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the [Federal Election] Commission”); see also R. Sam Garrett, *Deadlocked Votes among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress* 1 (Congressional Research Service, 2009), online at http://www.bradblog.com/wp-content/uploads/CRS_FEC_Deadlocks.pdf (visited Jan 10, 2014).

⁶⁶ Three commissioners may be sufficient, however, when there are vacancies, as long as the FEC fulfills its internally-mandated four-member quorum. See Rules of Procedure of the Federal Election Commission Pursuant to 2 U.S.C. § 437(c)(e), online at http://www.fec.gov/directives/directive_10.pdf (last visited Jan 12, 2014).

⁶⁷ See 42 USC § 15328 (stating that “[a]ny action which the [Election Assistance] Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members”). This rule could require potential unanimity under the agency's informal three-member quorum requirement. See, e.g., Election Assistance Commission, *Work Continues at the EAC*, online at http://www.eac.gov/blogs/work_continues_at_the_eac/ (Dec 14, 2011) (“A quorum (at least three commissioners) is required to determine new EAC policies, defined as ‘high level determinations, setting an overall agency goal/objective or otherwise setting rules, guidance or guidelines at the highest level.’”) (last visited Jan 12, 2014). This reading would be consistent with the statutory text requiring the approval of at least “three” EAC members for formal agency actions.

⁶⁸ 19 USC § 1330(d)(5). Besides the FEC and EAC, the only two other agencies that appear to have even-numbered commissions are the International Trade Commission and the Commission on Civil Rights. See 19 USC § 1330(a), (c) (2006) (six members on the International Trade Commission, not more than three of whom can be members of the same political party); 42 USC § 1975(b) (2006) (eight members on the Commission on Civil

On the one hand, these agencies' bipartisan-vote requirements reflect lofty legislative aspirations. The FECA House Report, for example, cites the dangers of "partisan misuse" and the hope that the FEC's majority-vote requirement would help to ensure a "mature and considered judgment."⁷⁰ On the other hand, the decision rules also invites intractable impasses, particularly over significant and high-profile issues.⁷¹ The EAC, for example, deadlocked 2-2 on *Intertribal*'s question of whether to include Arizona's proof-of-citizenship requirements on the federal registration form. One commenter derided the outcome as a "partisan stalemate" in the "one area" where the agency had regulatory authority.⁷²

B. Executive Agencies

By comparison, there are also two prominent executive agencies with single presidentially-appointed and senate-confirmed heads, the Department of Justice and the Department of Defense. While both federal agencies also regulate elections, their scope and structure differ from the FEC and EAC in important ways.

1. *Department of Justice* — The Department of Justice has been charged with helping to enforce a number of election-related statutes, including (what is left of) the Voting Rights Act (VRA).⁷³ Before *Shelby*

Rights, not more than four of whom can be from the same political party). The Commission on Civil Rights is primarily a fact-finding agency and periodically issues reports regarding civil rights policy and enforcement, serves as an information clearinghouse, and prepares public service announcement and advertising campaigns to discourage civil rights violations. See 42 USC § 1975a.

⁶⁹ Marian Wang, *As Political Groups Push Envelope, FEC Gridlock Gives "De Facto Green Light"* (ProPublica Nov 7, 2011), online at <http://www.propublica.org/article/as-political-donors-push-envelope-fec-gridlock-gives-de-facto-green-light/single> (visited Jan 10, 2014) ("Ultimately, the FEC is set up in such a way that when the commissioners deadlock, one side comes away with a de-facto win — the side seeking to preserve the status quo.").

⁷⁰ See also *Federal Election Campaign Act Amendments of 1976*, HR Rep No 94-917, 94th Cong, 2d Sess 3 (1976).

⁷¹ See Garrett, *Deadlocked Votes* at 4 (cited in note 65) ("Those issues on which deadlocks occurred . . . featured strong disagreement among Commissioners and reflected apparently unsettled positions on some major policy questions, such as political committee status, when particular activities triggered filing requirements or other regulation, and questions related to investigations and other enforcement matters. In addition, the deadlocks that did occur always fell along partisan lines.").

⁷² See Tokaji, 28 Yale L & Pol Rev at 135 (cited in note 6). See also Gueorguieva, 13 Geo Pub Pol Rev at 101–02; Press Release, *FEC Deadlocks On Attempted Evasion of Disclosure Laws* (Campaign Legal Center June 14, 2012), online at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1766:june-14-2012-fec-deadlocks-on-attempted-evasion-of-disclosure-laws&catid=63:legal-center-press-releases&Itemid=61 (visited Jan 10, 2014).

⁷³ In addition to the VRA discussed here, the Attorney General is also authorized to bring civil actions to enforce a number of other election-related statutes, such as the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act's provisions requiring states to provide uniform and nondiscriminatory election technology.

County invalidated VRA Section Four’s coverage formula,⁷⁴ the agency administered Section Five’s preclearance regime for jurisdictions covered by the formula. Those jurisdictions had to affirmatively demonstrate that the changes would “neither ha[ve] the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color.”⁷⁵ While covered jurisdictions could submit their voting changes to the DOJ or a federal district court in Washington, D.C., more than 99 percent of the preclearance requests were submitted for DOJ administrative review.⁷⁶

The current case law would make it difficult for the DOJ to successfully claim legislative rulemaking authority under Section Five — and indeed the DOJ has not done so, explicitly treating its regulations as guidelines.⁷⁷ Moreover, Section Five provides that litigants can bypass the DOJ administrative process to vindicate their claims directly in a judicial forum, further suggesting that Congress intended for the courts to play a primary interpretive role as well; the DOJ’s own regulations refer to the DOJ as a judicial “surrogate.”⁷⁸ Finally, the text of Section Five also does not explicitly grant DOJ rulemaking power,⁷⁹ and the Attorney General’s preclearance denial letters lack precedential value.⁸⁰

While Section Five is currently a hollow shell in *Shelby County*’s wake, the DOJ also enforces Section Two of the VRA, which bans electoral structures that result in members of a class of citizens defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁸¹ As such, Section Two is a nationally applicable prohibition against voting practices and procedures that discriminate on the basis of race, color, or language minority group. It has been used, for example, to challenge redistricting plans and at-large election systems, poll worker hiring, and voter registration procedures. It prohibits not only election-related practices that are intended to be racially discriminatory, but also

⁷⁴ See *Shelby County v Holder*, 133 S Ct 2612 (2013).

⁷⁵ 42 USC § 1973c (West 2011).

⁷⁶ See Department of Justice, Office of the Inspector General Oversight and Review Division, *A Review of the Operations of the Voting Section of the Civil Rights Division* 13 (March 2013), online at <http://www.justice.gov/oig/reports/2013/s1303.pdf> (visited Jan 10, 2014) (ascribing rates to the fact that the “Department’s administrative reviews are less expensive for the covered jurisdiction and generally result in a faster outcome”) (hereinafter, *Review of the Voting Section*).

⁷⁷ See Revisions of the Procedures for the Administration of Section 5 of the Voting Rights Act, 75 Fed Reg 33205 (proposed June 11, 2010) (to be codified at 29 CFR pts 0 and 51), citing 5 USC § 301.

⁷⁸ 42 USC § 1973c; 28 CFR § 51.52.

⁷⁹ 42 USC § 1973c. Section 12(d) of the Act authorizes the Attorney General to file suit to enjoin violations of Section 5.

⁸⁰ See *United States v Mead Corp*, 533 US 218, 232 (denying *Chevron* deference to tariff rulings on the grounds that they were not “the legislative type of activity that would naturally bind more than the parties to the ruling”). See also Krousser, 86 Tex L Rev at 683 (cited in note 155) (characterizing DOJ as restricted to the issuance of guidelines as opposed to “rules” and noting that “its objection letters [do] not have precedential force”).

⁸¹ Pub L No 89-110, 79 Stat 437 (codified as amended at 42 USC §§ 1973–1973bb-1 (2006)).

those that are shown to have a racially discriminatory impact.⁸² The Act allows the Attorney General, as well as private citizens, to bring suit to obtain court-ordered remedies.⁸³ The provision does not explicitly provide the DOJ with binding rulemaking authority, nor does the DOJ claim any.⁸⁴

Finally, in terms of staffing, what is striking about the DOJ is the extent to which many of the agency's election-related administrative duties are carried out by its career civil servants. The Civil Rights Division within the DOJ, for example, contains a dedicated Voting Section, which has had about 35-40 career attorneys at any given time.⁸⁵ In all, the unit has about a hundred employees, comprising attorneys, social scientists, civil rights analysts, and support personnel.⁸⁶

2. *Department of Defense* — Like the DOJ, the Department of Defense (DOD) is another executive branch agency, with a presidentially-nominated and senate-confirmed head. The DOD has sub-delegated its election-related duties, however, to the director of the DOD's Federal Voting Assistance Program (FVAP).⁸⁷ Substantively, FVAP is charged with administering statutes related to voting by citizens and military personnel overseas.⁸⁸ The Uniformed and Overseas Citizens Absentee Voting Act, for example, provides for a federal registration application, which allows qualified citizens abroad to register to vote and request an absentee ballot simultaneously.⁸⁹ Other FVAP responsibilities include developing and implementing voter registration procedures at army recruitment offices.⁹⁰

⁸² 42 USC §§ 1973–1973bb-1.

⁸³ 42 USC § 1973.

⁸⁴ 42 USC § 1973. The DOJ also helps to administer other lesser-known sections of the VRA, including Sections 3 and Section 8, which grant both the federal courts and the Attorney General the authority to certify counties to allow for the assignment of federal election observers, which can include DOJ staff. 42 USC § 1973(b). Sections 203 and 4(f)(4), in turn, are the language minority provisions of the Act, which require covered jurisdictions to provide bilingual written materials. 42 USC § 1973aa-1a(a). The DOJ has issued a guidance document to facilitate compliance. See 28 CFR 55, online at http://www.justice.gov/crt/about/vot/sec_203/28CFRPart55.pdf (visited Jan 10, 2014). Finally, Section 208 of the Act, allows voters who require assistance to vote by reason of blindness, disability, or inability to read or write to receive that assistance by an individual of the voters' choosing— as long as the individual is not the voter's employer or union representative. 42 USC § 1973aa-6.

⁸⁵ See Department of Justice, *Review of the Voting Section* at 9 (cited in note 76). The number of attorneys during this time has fluctuated slightly beyond this range, with 31 attorneys in 1998 and 45 in 2010.

⁸⁶ *Id.* (cited in note 76).

⁸⁷ See Exec Order No 12,642, 53 Fed Reg 21,975 (June 8, 1988) (designating Secretary of Defense as presidential designee under Act and allowing Secretary to sub-delegate within the Department of Defense). ; Federal Voting Assistance Program, *About FVAP*, online at <http://www.fvap.gov/info/about> (visited Jan 10, 2014).

⁸⁸ 42 USC §§ 1973ff-1973ff-6 (2006) (allowing for presidential sub-delegation of duties).

⁸⁹ Pub L No 99-410.

⁹⁰ In 2009, Congress further expanded UOCAVA's protections for overseas voting through the Military and Overseas Voter Empowerment Act, which imposes a specific deadline of forty-five days before Election Day for states to transmit validly-requested absentee ballots unless a state could show hardship. The statute also prohibits states from imposing a ballot notarization requirement. Pub L No 111-84, §§ 578–79, 123 Stat 2190, 2321–22 (2009) (codified as amended at 42 USC § 1973ff-1(a)(7)–(8) (2006 & Supp V 2012)). Pursuant to these authorities, the DOD has issued guidance establishing its policies and assigning responsibilities for implementing

III. DEFERENCE AND DEADLOCKS

With independent commissions structured to deadlock and executive branch agencies largely deprived of legislative rulemaking power, the emerging portrait of federal election administration is one in which some of the most important election-related statutes are being implemented, if at all, by courts. Federal administrators, by contrast, have been relegated to the sidelines despite their ability to collect cross-cutting data from multiple sources and to provide expert guidance beyond that provided by self-interested litigants.

This Part considers how courts should interpret election-related statutes in light of agencies' comparative expertise and structural incentives to deadlock. It suggests that deference should be calibrated to the institutional role of the actors authoring the interpretive documents and, specifically, the degree to which they are internally politically insulated. In this sense, it seeks to develop the idea of internal agency independence and, in doing so, to help foster legitimate tie-breaking considerations.

A. Tie-breakers

Agency deadlocks of the kind that plagued the EAC in *Intertribal* pose an especially pernicious set of problems for election administration, and administrative law more generally. Deadlocks stymie the often swift and decisive resolution critically necessary before an impending election, especially given the risks of instability or perceived illegitimacy. Some, for example, have defended the Supreme Court's intervention in *Bush v. Gore* on the grounds that, barring all else, it provided a final resolution that helped to preserve stability and order.⁹¹ In *Intertribal*, the imminence of

voter assistance offices as well as developing procedures for persons to apply to register to vote at military recruitment offices. See Department of Defense, Federal Voting Assistance Program, Instruction No 1000.04 (Sept 13, 2012), online at <http://www.dtic.mil/whs/directives/corres/pdf/100004p.pdf> (visited Jan 10, 2014). Other related statutes include the Soldier Voting Act of 1942, Pub L No 77-712, amended in 1944; the Federal Voting Assistance Act of 1955, Pub L No 84-296; and the 1975 Overseas Citizens Voting Rights Act, Pub L No 94-203.

⁹¹ 531 US 98 (2000). See Richard H. Pildes, *Democracy and Disorder*, 68 U Chi L Rev 695, 715 (2001) (exploring *Bush v. Gore* through cultural lens that "'democracy' required judicially-ensured order, stability, and certainty").

Arizona's impending election was cited to justify an expedited agency procedure in the hopes of providing a final resolution for various states.⁹²

Administrative deadlocks also undermine the implementation of duly-enacted laws and judicial decisions. In this sense, they can foil otherwise legitimate acts through administrative impasse. Deadlocks resulting in agency inaction can also have pernicious electoral consequences. To take one extreme example, because Illinois politicians in the early 1960s deadlocked over a new redistricting plan for the state legislature in light of new census data, all 236 candidates for 177 seats ended up running together in a single, at-large race.⁹³ More recently, the FEC has witnessed a string of 3-3 votes along party lines, with some empirical evidence suggesting a recent uptick in deadlocks for proposed enforcement actions, audits, and rulemakings.⁹⁴ Among the most controversial have been those preventing the FEC from promulgating meaningful disclosure rules in response to *Citizens United*, which upheld the statutory disclosure provisions at issue.⁹⁵ At one point, the impasse was so protracted that the commissioners could not even agree to accept public comments, though it eventually issued broad questions about possible regulatory approaches.⁹⁶ A final rule has yet to be issued.

The twin challenges for federal election administration, then, are how to facilitate the application of high-quality information to the development of electoral regulatory policy while also resolving agency

⁹² Statement of EAC Chairman Paul DeGregorio, Joint Appendix, 2012 WL 6198263 at 225 (“I was also very concerned that with the August 14, 2006, voter registration deadline for the Arizona primary election fast approaching, that time was of the essence on this issue.”)

⁹³ See Adam M. Samaha, *On Law's Tiebreakers*, 77 U Chi L Rev 1661, 1684–85 (2010) (discussing example).

⁹⁴ See Christopher Rowland, *Deadlock by Design Hobbles Election Agency*, Boston Globe (July 7, 2013), online at <http://www.bostonglobe.com/news/nation/2013/07/06/america-campaign-finance-watchdog-rendered-nearly-toothless-its-own-appointed-commissioners/44zZoJwnzEHyzxTByNL2QP/story.html#share-nav> (noting that the “frequency of deadlocked votes resulting in dismissed cases . . . has shot up, to 19 percent, from less than 1 percent”); *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* (Public Citizen 2013), online at <http://www.citizen.org/documents/fec-deadlock-statement-and-chart-january-2013.pdf> (visited Jan 10, 2014) (compiling data); Garrett, *Deadlocked Votes* at 4–6 (cited in note 65) (displaying data on frequency of FEC deadlock from July 2008–July 2009).

⁹⁵ See, for example, Bernie Becker, *Election Commission Decisions Deadlocking on Party Lines*, NY Times A16 (Sept 27, 2009); Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs* (ProPublica Dec 2, 2011), online at <http://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs> (visited Jan 10, 2014); Kathleen Ronayne, *Federal Election Commission Deadlocks in Discussions about New Disclosure Rules for Political Advertisements*, Open Secrets Blog (June 16, 2011), online at <http://www.opensecrets.org/news/2011/06/federal-election-commission-deadlocks.html> (visited Jan 10, 2014); Kenneth P. Doyle, *Bauerly: FEC to Vote Again on Launch Of Rulemaking to Adjust to Citizens United*, Daily Rep Exec (BNA) No 11, at A-13 (June 10, 2011) (“The commissioners deadlocked 3-3 in a party-line vote on whether to move forward with a new rulemaking proposal” to implement disclosure rules in light of *Citizens United*).

⁹⁶ See Trevor Potter, *How the FEC Can Stop the Tidal Wave of Secret Political Cash*, Wash Post (Nov 16, 2012), online at http://www.washingtonpost.com/opinions/how-the-fec-can-stop-the-tidal-wave-of-secret-political-cash/2012/11/16/966c48cc-2dae-11e2-89d4-040c9330702a_story.html (visited Jan 10, 2014). The commission deadlocked in two 3-3 votes on draft NPRM documents as well: 11-02, draft A, and 11-02-A, at the January 20, 2011, meeting. See Federal Election Commission, *Minutes of an Open Meeting of the Federal Election Commission* 4–5 (Jan 20, 2011), online at http://www.fec.gov/agenda/2011/approved2011_06.pdf (visited Jan 10, 2014). See also Federal Election Commission, *Minutes of an Open Meeting of the Federal Election Commission* 3–4 (June 15, 2011), online at http://www.fec.gov/agenda/2011/approved2011_39.pdf (visited Jan 10, 2014).

impasse. While exogenous changes such as different voting rules could be ameliorative, doctrinal innovations may be warranted instead when institutional reforms are unlikely.⁹⁷ One reason this approach may be prudent in the election context is that achieving legislative agreement on election reform may be difficult, if not impossible, without attached conditions such as the even-numbered bipartisan boards that lead to deadlock in the first place.

Such design choices for election-related agencies like the FEC and EAC likely reflect the congressional desire to ensure that controversial election policies do not proceed unless it serves the interests of both parties as reflected in a bipartisan majority vote. But, while bipartisan consensus would be the first-best outcome, what is a court to do when required to review the conflicting statutory interpretations of split commissioners in constitutional or APA-based suits — should it determine the issue itself or defer to a particular agency actor? Answering this question requires a comparative analysis of the institutional competencies of agency and judicial actors in election-related interpretation. Absent the first-best bipartisan decision, courts should search for second-best solutions by seeking guidance from actors more experienced with the statute’s administration.

The situation frequently arises when the underlying statute itself provides for judicial review of a deadlocked decision or, alternatively, when the suit is brought on constitutional grounds. In *Democratic Congressional Campaign Commission (DCCC) v. FEC*, for example, the D.C. Circuit observed that the Federal Election Campaign Act allowed for judicial review of agency proceedings that resulted in complaint dismissals.⁹⁸ As background, FEC enforcement proceedings are initiated either by a complaint filed with the FEC, usually by a candidate or political party, or by the FEC itself after its review of political committee reports.⁹⁹ Once initiated, the General Counsel’s office evaluates the matter and provides a recommendation to the six-member Commission indicating whether there is “reason to believe” a violation has occurred or is about to occur. Should a majority of the Commission concur with the General Counsel’s finding, the FEC then attempts to reach a conciliation agreement through informal negotiation with the potential violators. If negotiation does not resolve the

⁹⁷ See Cass R. Sunstein and Thomas J. Miles, *Depoliticizing Administrative Law*, 58 Duke L J 2193, 2193–94 (2009).

⁹⁸ See *Democratic Congressional Campaign Committee (DCCC) v. Federal Election Commission*, 831 F.2d 1131 (DC Cir 1987) (noting that FECA explicitly states that “[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia” (citing 2 USC § 437g(a)(8)(A)).

⁹⁹ 2 USC § 437g(a)(1)–(2).

matter, then the Commission can work with the DOJ to file suit in district court.¹⁰⁰

Under this scheme, the *DCCC* plaintiffs had filed a complaint alleging that the National Republican Campaign Committee had improperly failed to allocate the cost of a mailing campaign against the relevant FECA spending cap. The complaint’s validity turned on whether the mailer constituted an “electioneering message.” The FEC’s General Counsel found reason to believe that it was, based on two previous commission advisory opinions interpreting the statutory term. When the FEC voted, however, only three Commissioners agreed. With four votes required for further action, the complaint was dismissed.¹⁰¹

In litigation, the FEC argued that the deadlock should be unreviewable since it purportedly resolved no substantive issue.¹⁰² The court pointed out, however, that dismissals based on 5-1 or even 6-0 votes could similarly fail to resolve a decision substantively since the basis for the votes are often unclear. Perhaps the votes were the product of logrolling, legal uncertainty or a judgment that the decision should be deferred; as a result, the FEC’s argument rang hollow. In the alternative, the FEC argued that deadlocks were merely unreviewable exercises of prosecutorial discretion in deciding not to pursue a complaint. Again, however, the court rejected the argument on the grounds that 3-3 deadlocks could not be distinguished from 6-0 decisions to dismiss a complaint, decisions that were clearly reviewable under FECA.

As a result, the D.C. Circuit then took an intra-agency disagreement between an insulated internal actor — the General Counsel — and a split commission as reason to take closer look at the proffered legal rationales of both sets of actors. Specifically, it held that when the FEC’s General Counsel recommends an affirmative agency action but the agency’s politically-appointed commissioners deadlock on the recommendation, the commissioners must provide a statement of reviewable reasons.¹⁰³ Importantly, this reason-giving requirement was justified, at least initially, only in situations when the internal staff actor disagreed with the deadlocked commission.

Without this requirement, the panel noted, it would be impossible for a court to “intelligently determine” whether the commissioners were acting contrary to law or in an arbitrary-and-capricious manner.¹⁰⁴ The

¹⁰⁰ 2 USC § 437g(a)(1)–(2).

¹⁰¹ *DCCC*, 831 F2d at 1132.

¹⁰² *Id.* at 1133.

¹⁰³ See *Democratic Congressional Campaign Committee (DCCC) v Federal Election Commission*, 831 F2d 1131 (DC Cir 1987). See also *Common Cause v Federal Election Commission*, 842 F2d 436 (DC Cir 1988) (reaffirming requirement for FEC to provide reasons for deadlock when General Counsel recommends otherwise, but declining to apply requirement retroactively).

¹⁰⁴ *Id.* at 1132.

FEC, that is, sent worrisome signals of arbitrariness in the form of “conflicting messages” when the FEC dismissed a complaint without a rationale, despite seemingly contrary precedents identified by the FEC’s own General Counsel.¹⁰⁵ A later D.C. Circuit opinion offered other policy justifications for the requirement: it helped to ensure intra-agency reflection and deliberation, contributed to better reasoned outcomes, and also provided an opportunity for agency self-correction.¹⁰⁶ Indeed, one way to understand this common law requirement is in terms of the court’s recognition that a conflict between a senior career staff member (here, the General Counsel with a reputation for independence¹⁰⁷) and a deadlocked board merited closer review of the latter. By imposing a reason-giving requirement, the court helped to ensure that the agency’s internal expertise could be brought to bear on the commission’s eventual resolution.

The next critical question that arises, then, is *which* interpretive statement of reasons courts should review and grant deference to, if at all. Possibilities include the initial interpretation of the FEC’s General Counsel, the separate opinions of the commissioners, or a *de novo* interpretation by the court itself. Of these, the D.C. Circuit has puzzlingly held that statements issued by the bloc of commissioners voting against agency enforcement should constitute the prevailing interpretation and, what is more, that they would be entitled to *Chevron* deference — that is, deference to “permissible” interpretations of statutes that are otherwise ambiguous.¹⁰⁸ The court’s first premise was that the commissioners who voted to dismiss the complaint “constitute[d] a controlling group” and thus its “rationale necessarily states the agency’s reasons for acting as it did.”¹⁰⁹ Note, however, that the dismissing group comprised the “controlling” faction only because the decision to pursue the enforcement required a majority.

The court further reasoned that *Chevron* deference was due since the underlying statute itself evinced a legislative intent to delegate that interpretive authority and the agency exercised that authority.¹¹⁰ Such intent can ordinarily be inferred when Congress grants an agency the power to act with the force of law through formalized procedures like notice-and-comment rulemaking or formal adjudication, and the agency employed

¹⁰⁵ Id at 1133.

¹⁰⁶ See *Common Cause*, 842 F2d at 449.

¹⁰⁷ See Bob Bauer, *The Federal Election Commission and its Choice of a General Counsel*, *More Soft Money Hard Law* (June 7, 2013), online at <http://www.moresoftmoneyhardlaw.com/2013/06/fec-general-counsel/> (visited Jan 11, 2014).

¹⁰⁸ See *Federal Election Commission v National Republican Senatorial Committee*, 966 F2d 1476 (DC Cir 1992). Agencies are currently accorded *Chevron* deference to interpretations of statutes which they administer. *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842 (1984). *Chevron*’s two-part test is a familiar one: First, the judge must ask “whether Congress has directly spoken to the precise question at issue.” If Congress’s intent is “clear,” then that intention governs; but if the statute is ambiguous or silent, then in Step Two, courts ask whether the agency’s interpretation is “permissible” and, if so, defer accordingly. Id at 842–43.

¹⁰⁹ Id at 1476.

¹¹⁰ See *United States v. Mead Corporation*, 533 US 218, 226–27 (2001).

those procedures.¹¹¹ Because FECA’s adjudicatory scheme was analogous to formal adjudication in essentially creating an adversarial process between the FEC’s General Counsel and the respondent,¹¹² the D.C. Circuit reasoned that *Chevron* applied to the controlling opinions of deadlocked decisions. The court further noted, even more oddly, that the “Commission is *inherently bipartisan* in that no more than three of its six voting members may be of the same political party” as further reason for deference.¹¹³

The D.C. Circuit’s approach, however, fails to appreciate election-specific concerns amidst the structure of agencies like the FEC. Namely, it does not recognize that a deadlocked vote within an election-related agency is functionally different than a majority vote in favor of complaint dismissal, which would constitute an affirmative, bipartisan decision not to enforce the statute in a particular way. Whereas a majority vote in the election setting connotes party agreement, a deadlock suggests the converse: a vote split along party lines. Such an outcome is particularly problematic in election administration since a deadlock in favor of inaction and the status quo can privilege incumbents who were elected according to the existing rules.

Framed in this way, it becomes easier to see why courts should not grant *Chevron* deference to the deadlock coalition that successfully blocks the agency determination. First, as a doctrinal matter, an agency must affirmatively exercise its power to act with the force of law in order to receive deference.¹¹⁴ To the contrary, an FEC deadlock is not an exercise of lawmaking authority and thus does not warrant judicial respect when hamstrung along party lines. Second, the rationale of *Chevron* is firmly grounded in presumed legislative intent (however fictional).¹¹⁵ As a result, granting deference to a non-majority block of a deadlocked panel would be contrary to what Congress intended by creating a majority voting rule on a bipartisan commission. Finally, from a more dynamic perspective, granting *Chevron* deference to an agency tie blunts the incentives of commissioners to seek bipartisan consensus; by contrast, withholding such deference until a majority is achieved is more likely to foster the cooperation across party lines that Congress desired.

¹¹¹ Id. at 229-31.

¹¹² See *In re Sealed Case*, 223 F3d 775, 780 (DC Cir 2000).

¹¹³ *In re Sealed Case*, 223 F3d at 781 (emphasis added) citing *Federal Election Commission v Democratic Senatorial Campaign Committee*, 454 US 27, 37 (1981).

¹¹⁴ See note 110 and accompanying text.

¹¹⁵ See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo L J 833, 870-72 (2001) (noting that the *Chevron* rationale that “finds the most support in the Court’s own language” is that such deference “arises out of background presumptions of congressional intent”) (internal quotations omitted); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 516-17.

B. Internal Independence

If *Chevron* is misplaced when agencies deadlock, courts are then left to evaluate the persuasiveness of agency interpretations for themselves, pursuant to what is known as *Skidmore* deference.¹¹⁶ Under this test, courts look at a number of *Skidmore* factors such as the “thoroughness” of the agency’s consideration, the reasoning’s “validity” and “consistency” and, more generally, any factors which give an interpretation power to persuade, if lacking power to control.”¹¹⁷ The analysis applies even when the agency itself is not a party, as was the case with the EAC in *Intertribal*. Given the unique concerns of federal election administration, the primary *Skidmore* factor in the electoral setting should be the extent to which the agency actor is institutionally insulated from partisan influence. Instead of blindly allowing the default controlling bloc to definitively interpret an underlying statute, that is, courts should look instead at the interpretation of the actor most likely to bring to bear the agency’s expertise and administrative experience.

While this approach would not necessarily modify *Skidmore*’s multi-factor analysis as such, it would shift its emphasis and place the identity of the decision-maker in the foreground when the agency regulates elections.¹¹⁸ Such *Skidmore* inquiries, for example, would look at indicia of political independence, such as tenure and salary protections, methods of appointment, and the degree of professionalization, among other dimensions. It would apply to the myriad informal ways in which insulated agency actors attempt to provide guidance drawn from their expertise. Internally insulated expertise, for example, is frequently generated by career staff within agencies, primarily through sub-regulatory informal guidance documents. There are both senior career officials who hold positions in the Senior Executive Service or otherwise upper management General Schedule positions as well as the more “rank-and-file career workforce.”¹¹⁹ In

¹¹⁶ See *Skidmore v. Swift & Co.*, 323 US 134 (1944). *Skidmore* considered whether the time workers spent on call for a packing plant constituted “working time” due overtime pay under the Fair Labor Standards Act. In an amicus brief, the Department of Labor’s Administrator of the Wage and Hour Division (who had previously issued interpretive bulletins applying the statutory provision to various hypothetical situations) opined that only some of that time could be categorized as such. While lower courts had ignored the Administrator’s views, the Supreme Court recognized that such views could be informed by the agency’s expertise and experience.
¹¹⁷ *Id.* at 140.

¹¹⁸ This emphasis would help to guide courts application of *Skidmore*, which can otherwise be less directed and more ad hoc. See Kristen E. Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum L Rev 1235, 1291 (2007) (observing that the “appellate courts seem to believe that *Skidmore* review represents something more than mere totality of the circumstances evaluation,” though they “are uncertain as to precisely what that something is”).

¹¹⁹ See Johnson and Libecap at 7 (cited in note 134). The General Schedule is the basic pay schedule for federal government employees. See 5 USC § 5332. While these lines are somewhat arbitrary, another possibility for drawing the line between senior and junior career employees would follow the Supreme Court’s approach in *United States v National Treasury Employees Union* engaging in a First Amendment analysis of an honoraria ban by crudely distinguishing between “high-level” and “rank-and-file” staff as those above and below General

addition to career staff, agencies also often use advisory committees to provide technical advice or recommendations, subject to federal laws regulating the disclosure and openness of meetings.¹²⁰ While courts currently do not apply formal deference doctrines to advisory committees, courts could critically review agency rejections of expert advisory committee opinions, especially when those opinions are required by statute.¹²¹

This institutional approach is especially appropriate in federal election administration given its heightened concerns over self-dealing and partisanship. While *Skidmore* speaks broadly of the “agency,” treating the “agency” as a monolithic entity makes little sense here. In Peter Strauss’ words, the “anthropomorphic tendency to treat agencies as if they were a single human actor is particularly distracting and distorting when one is analyzing a medium that the constituent elements of complex institutions use to speak to each other.”¹²² Indeed, agencies operate according to sophisticated internal decision-making processes and personnel decisions often informed by the very expertise-related factors that courts attempt to otherwise address in an institutional vacuum. One important way that judges, like ordinary individuals, evaluate the persuasiveness or credibility of an analysis is by looking at the author’s identity and the related probability of bias and/or sound expertise. Expert witnesses in court, for example, are regularly called upon to disclose their conflicts-of-interest and related professional background.¹²³

The notion of looking at the institutional role of the interpretive actor when deciding whether and how to grant deference is not new. The perspective has been advanced by two current members of the Court, among others. Justice Scalia’s dissent in *United States v. Mead Corporation*, for example, advocated for a deference regime that would simply look to whether the interpretation is “authoritative” in the sense that it “represents the official position of the agency.”¹²⁴ Because the custom letter’s interpretation in *Mead* had been ratified by the General Counsel of the Treasury and the Solicitor General in briefs, *Chevron* deference in his

Schedule level 16 (GS-16) on the federal government’s pay scale. *United States v. National Treasury Employees Union*, 513 US 454, 472, 478 (1995).

¹²⁰ See, for example, Federal Advisory Committee Act (FACA), 5 USC App 2 §§ 1–16; Freedom of Information Act, 5 USC § 552(b).

¹²¹ See, for example, *American Farm Bureau Federation v. EPA*, 559 F3d 512, 521 (DC Cir 2009) (“The EPA failed adequately to explain its reason for not accepting the [Clean Air Scientific Advisory Committee]’s recommendations”); *Coalition of Battery Recyclers Association v. EPA*, 604 F3d 613, 619 (DC Cir 2010) (favorably noting that the EPA had considered some of the Clean Air Scientific Advisory Committee’s concerns, despite not following its precise recommendations).

¹²² See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin L Rev 803, 810 (2001).

¹²³ See, for example, FRCP 26(a)(2) (requiring, among other things, “a complete statement of all opinions the witness will express and the basis and reasons for them,” “the facts or data considered by the witness,” and “the witness’s qualifications”).

¹²⁴ See 121 S Ct at 2187.

view was appropriate. Developing this idea of looking at the “who” as opposed to the “how” of agency decision-making, David Barron and now-Justice Elena Kagan have similarly argued that courts should give *Chevron* deference when the “congressional delegatee” identified by statute “takes personal responsibility for the decision.”¹²⁵ Such an approach, they contend, would encourage more accountable and well-considered agency decision-making consistent with *Chevron*’s underlying policy goals.¹²⁶

While these proposals are *Chevron*-centered, there are good reasons to extend the conceptual move to the *Skidmore* context as well, particularly when the regulatory domain is that of federal election administration. Unlike *Chevron*’s grounding in hypothetical legislative intent, *Skidmore*’s foundations are prudential.¹²⁷ *Skidmore* deference recognizes that courts are well-equipped to engage in statutory interpretation, but that they can also lack the experience and expertise to appreciate the consequences of alternative interpretations. As such, *Skidmore* asks judges to weigh the reasons why an interpretation is persuasive based in part on its source or “pedigree.”¹²⁸

Granting *Skidmore* deference when an informal guidance document or letter is prepared and signed by an expert, insulated career staff member would privilege the myriad documents and informal guidance reviewed by the most experienced actors within an agency, while also incorporating the experiences and insights of their subordinates. Some courts already appear to be taking into account such institutional considerations.¹²⁹ To be sure, the participation of high-level political appointees bears many of these same benefits in terms of drawing upon the agency’s expertise (indeed, agency heads often sign documents or interpretations that were drafted by or with the participation of career staff). But none of these benefits exist when political appointees deadlock.

Functionally, it is important to note that the proposed tailoring in the election context would simply encourage a judicial partnership with expert, internally insulated actors. It would not call for judges to abdicate their role under *Skidmore* in reviewing such documents, who would continue to consider other factors such as thoroughness and consistency, nor would it allow career staff to override a valid majority decision of the commissioners when they manage to secure a bipartisan consensus. Rather, the approach developed here would apply when agencies deadlock, and courts are called upon to resolve a statutory ambiguity.

¹²⁵ See David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup Ct Rev 201, 204 (2001).

¹²⁶ *Id.* at 238.

¹²⁷ See Hickman and Krueger, 107 Colum L Rev at 1249 (cited in note 118).

¹²⁸ *Id.* at 1251.

¹²⁹ See, for example, *De La Mota v United States Department of Education*, 412 F3d 71, 80 (2nd Cir 2005) (“We have shown deference to the opinions of agency officials who, though not an agency secretary or commissioner, hold substantial responsibility.”).

At the same time, one might worry that this deference regime is inconsistent with legislative intent. If Congress had wanted to create an expert, non-partisan election administration agency with a permanent staff, it could have done so. Instead, it set up a politically appointed commission and protected against partisanship through a bi-partisan voting rule. The point that this objection misses, however, is that Congress also provided for judicial review of the agency's actions, sometimes explicitly as in the case of FEC enforcement proceedings or implicitly through a choice not to preclude review.¹³⁰ Thus, the familiar administrative law question is whether such reviewable statutory ambiguities are better understood as a delegation of interpretive authority to a court acting alone or rather as a cooperative endeavor between courts and expert agency actors when commissioners deadlock.

This interpretive approach is especially warranted given the comparative institutional weaknesses of courts relative to career staff or advisory commissions in this arena. While federal judges are politically insulated by virtue of Article III tenure and salary protections, empirical evidence demonstrates that they are hardly immune from partisan loyalties and, to the contrary, often vote in ways that favor their appointing party.¹³¹ Moreover, most election administration litigation is fact-intensive and arises in a procedural posture that often requires courts to expedite their consideration of the claims based on incomplete records. As a result, judges must intervene without the requisite data to inform their decisions. These institutional weaknesses, coupled with the charged political nature of the cases render courts (and particularly the Supreme Court) ill-suited to resolve election-related disputes.¹³²

By contrast, career staff within administrative agencies also have various salary and tenure protections but, in addition, possess experience and expertise in administering federal elections. Such staff are protected, for example, by the 1978 Civil Service Reform Act, which prohibits agency personnel decisions not taken on the basis of merit.¹³³ They also have “strict tenure guarantees, have no expressed ties to the administration or to

¹³⁰ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (providing for a presumption of judicial review of agency action unless there was “clear and convincing” evidence that the statute precluded it).

¹³¹ See Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges* 8 (Harvard 2013) (“Justices appointed by Republican presidents vote more conservatively on average than justices appointed by Democratic ones, with the difference being most pronounced in civil rights cases.”); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum L. Rev 1, 21-29 (2008) (concluding that Democratic appointees are significantly more likely than Republican ones to find violations of Section Two of the Voting Rights Act); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 Am Pol Sci Rev 413, 417-18 (1995) (finding evidence that judges appointed by a party were more likely to strike down redistricting maps drawn by the other party).

¹³² See Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St L J 1065, 1067 (2007)

¹³³ Pub L No 95-454, 92 Stat 1111.

Congress, and by law are to be politically neutral.”¹³⁴ Furthermore, civil service salaries are protected from political appropriations decisions and the wages are fairly compressed within the federal pay structure.¹³⁵

Moreover, these internal agency actors also possess the resources to gather information across jurisdictions over longer periods of time. Indeed, it was this need for reliable data that originally spurred Congress to create a number of bureaucratic entities charged with researching cross-cutting election administration issues. In 1971, for example, Congress created the Office of Federal Elections within what is now known as the General Accountability Office.¹³⁶ It was moved in 1974 to the FEC where it eventually became known as the Office of Election Administration, before its staff and functions were finally later transferred to the EAC.¹³⁷ During its various evolutions, the office commissioned a number of influential election administration studies.¹³⁸ In addition, it created advisory boards and disseminated information to state and local election administrators. While housed in the EAC, the staff has formulated voluntary voting system guidelines, compiled data and reports on absentee ballots for overseas voters, and tested and certified voting system hardware and software.¹³⁹

In this manner, one of the main functions of federal election-related agencies has been to aggregate, develop, and solicit information about election practices across various states and even from overseas. Election administration decisions should take into account this accumulated storehouse of information and, in the context of statutory interpretation, should consider an interpretation’s persuasiveness by virtue of the experience and insulated institutional role of its author. When the role is that of making recommendations to politically-appointed commissioners based on previous experience administering the statute, then judges would be especially wise to consider those views.

C. Implications and Objections

Returning now to *Intertribal*, it is useful to see how the Court’s analysis might have differed when applying the institutional *Skidmore*

¹³⁴ See Ronald N. Johnson and Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* 7 (Chicago 1994).

¹³⁵ See *id.* at 5; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2331–32 (2006).

¹³⁶ See Robert S. Montjoy and Douglas M. Chapin, *The U.S. Election Assistance Commission: What Role in the Administration of Elections?* 35 *Publius* 617, 620 (2005).

¹³⁷ *Id.* at 627.

¹³⁸ See, for example, Roy Saltman, *Effective Use of Computing Technology in Vote-Tallying* (National Bureau of Standards Project Report, 1975); Richard G. Smolka and W. Edward Weems Jr., *A Study of Election Difficulties in Representative American Jurisdictions* (Office of Federal Elections, 1973).

¹³⁹ *Id.*

approach developed here. Namely, this view of *Skidmore* would have drawn the Court to consider the EAC executive director’s institutional role and opinion letter in light of the agency’s deadlock, instead of ignoring the letter altogether as a basis for decision. Recall that, although the EAC is vested with rulemaking authority,¹⁴⁰ the commission split along party lines as to how to resolve the statutory ambiguity: how must states “accept and use” the federal registration form? Because it ignored the EAC executive director’s opinion, the *Intertribal* Court did not explicitly consider how much weight to give the letter, though the issue was raised in the merits briefs and the Court conceded that the statute was ambiguous.¹⁴¹

Judge Kozinski, concurring in the Ninth Circuit’s first panel decision below, however, did consider the question. First, he observed that the director’s opinion letter lacked the “force of law” and therefore did not merit *Chevron* deference.¹⁴² He further noted that courts did not normally grant deference to agency preemption determinations contained in informal opinion letters, but rather applied *Skidmore*.¹⁴³ While the Ninth Circuit majority acknowledged that *Skidmore* analysis could be appropriate, it declined to apply it on the grounds that the NVRA’s legislative history and the EAC executive director’s view were both consistent with the Ninth Circuit’s holding.¹⁴⁴ In this manner, the panel, like the Supreme Court, interpreted the NVRA independently on its own and without reference to the EAC director’s own well-reasoned analysis.¹⁴⁵

The EAC’s executive director is a senior staff position with a renewable four-year appointment “responsible for implementing EAC policy and administering EAC’s day-to-day operations.”¹⁴⁶ He is appointed by a majority vote of the commission, whose members could only consider three nominations chosen from a search committee appointed by the EAC’s Standards Board and Board of Advisors.¹⁴⁷ As such, the position requires the bipartisan vote of the commission only after nomination by expert

¹⁴⁰ 42 USC § 1973gg-7(a)(1).

¹⁴¹ State Petitioners’ Brief on the Merits, *Inter Tribal Council*, No 12-71, at *28, 44–46. *Inter Tribal Council*, No 12-71, slip op at 6 (“Taken in isolation, the mandate that a State ‘accept and use’ the Federal Form is fairly susceptible of two interpretations.”).

¹⁴² *Gonzalez*, 624 F3d at 1208 (Kozinski concurring).

¹⁴³ *Gonzalez*, 624 F3d at 1208, citing *Wyeth v Levine*, 555 US 555 (2009). The *Wyeth* Court declared that “[w]hile agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer . . . [thus, the] weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.” *Wyeth*, 555 US at 577 (citation omitted).

¹⁴⁴ See *Gonzalez*, 677 F3d at 403 n 29.

¹⁴⁵ Among other things, the director spoke to the statutory provision’s purpose — “set[ting] the proof required to demonstrate voter qualification” — and the EAC’s experience and delegated responsibility to create and administer the federal voter registration form. See Joint Appendix, *Arizona v Inter Tribal Council of Arizona*, 2012 WL 6198263, *184-86 (2012).

¹⁴⁶ See Election Assistance Commission, *The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission* 6, online at http://www.eac.gov/assets/1/workflow_staging/Page/348.PDF (visited Jan 11, 2014).

¹⁴⁷ 42 USC § 15324(a)(3).

advisory boards. The director's duties, in turn, include maintaining the federal voter registration form and answering questions regarding the application of the NVRA and HAVA consistent with EAC's guidance documents, regulations, advisories and policy statements.¹⁴⁸ Though the chair of the EAC is charged with providing administrative direction to the executive director, that direction is not to be undertaken without input from each commissioner.¹⁴⁹

As such, the EAC executive director has experience administering the agency's authorizing federal statutes across states and jurisdictions. Moreover, the executive director is likely to have a sound professional reputation as well as productive relationships with the state and local election officials who had nominated him (which the executive director in this case in fact did have).¹⁵⁰ Thus, there were multiple reasons to believe that norms of professionalism and expertise helped to bolster the independence of his position. In interpreting the NVRA, the Court would have benefited from considering the EAC executive director's interpretive opinion for its persuasiveness in light of the institutional position of its author. While it is true that the Court's substantive conclusion happened to align with that of the director in this case, such contingencies do not warrant the lack of judicial attention to insulated agency actors in future cases.

Turning now to other implications of the *Skidmore* approach developed here, courts should conversely be more hesitant to grant deference to agency actors that lack the structural protections against partisan influence of the kind that existed for the EAC's executive director.¹⁵¹ Indeed, the increasing sense that the DOJ — recall, an executive agency with a single, appointed agency head — had politicized its interpretations under the Voting Rights Act (VRA) may help to explain the Supreme Court's general refusal to defer to the agency.¹⁵² Indeed, one analysis describes the Court's recent approach as one of "anti-deference" and even "hostility."¹⁵³ Helping to explain this judicial skepticism, perhaps, was the perception that the DOJ had been issuing sub-regulatory documents that were evolving according to the administration's partisan affiliation. In

¹⁴⁸ Id at 7.

¹⁴⁹ See Election Assistance Commission, *The Roles and Responsibilities of the Commissioners and Executive Director of the U.S. Election Assistance Commission* 4-5, online at http://www.eac.gov/assets/1/workflow_staging/Page/348.PDF (visited Jan 11, 2014).

¹⁵⁰ See United States Election Assistance Commission, *Thomas R. Wilkey*, online at http://www.eac.gov/about_the_eac/thomas_r_wilkey.aspx (visited Jan 12, 2014).

¹⁵¹ While he does not develop the insight in great depth, Christopher Elmendorf also mentions the possibility that "courts might reverse the normal presumption of deference to administrative agencies in voting cases if the agency's governing body is partisan in structure, rather than bipartisan or neutral." Elmendorf, 95 Cornell L Rev at 1097 (cited in note 186).

¹⁵² See Arpit K. Garg, *A Deference Theory of Section Five* (Draft as of April 1, 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209636 (visited Jan 10, 2014).

¹⁵³ Id at 5.

this sense, the approach proposed here may help to articulate what has already been happening as a matter of course.

To facilitate Section Five’s preclearance process, for example, the DOJ first published an interpretive rule for public comment in 1971 under the Republican President Nixon.¹⁵⁴ The proposal initially provided that the Attorney General would object to a preclearance submission only if he or she affirmatively determined that the law would have a discriminatory effect or purpose. In practice, this required showing constituted a more onerous standard than had previously existed. The final guidelines issued a few months later, by contrast, called for the Attorney General to object even if the evidence was still indeterminate — a change prompted only by countervailing pressure from congressional and civil rights groups.¹⁵⁵

The evolution of the guidelines, with revisions in 1981 and 1987, continued to reflect attempts to track the shifting views of the administration in power.¹⁵⁶ For example, in 1985, Republican President Reagan’s DOJ initially proposed that it would refuse preclearance under Section 5 using Section 2’s result-oriented test, that is, only if the allegations showed by “clear and convincing evidence” that the change had a discriminatory result.¹⁵⁷ This policy shift would have reversed the previous burden of proof under Section 5 and set a new higher evidentiary standard. In response to legislative hearings and public criticism, however, the DOJ’s finalized 1987 guidelines instead eliminated the burden shift and incorporated a results test with only a “clear” evidentiary standard.¹⁵⁸

More recently, in 2010, Democratic President Obama’s DOJ published a notice proposing amendments for public comment.¹⁵⁹ Among other things, the proposal sought to reflect legislative changes to Section Five, which clarified that the term “purpose” included “any discriminatory purpose” and not just those that reflected an intention to retrogress, thus potentially expanding Section Five liability. Moreover, the regulations also

¹⁵⁴ See Administration of Voting Rights Act of 1965, 36 Fed Reg 9781 (May 28, 1971).

¹⁵⁵ See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 36 Fed Reg 18186 (Sept 10, 1971) (codified at 28 CFR pt 51 (1972)); J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 Tex L Rev 667, 683 (2008) (characterizing DOJ as restricted to the issuance of guidelines as opposed to “rules” and noting that “its objection letters [do] not have precedential force”).

¹⁵⁶ See generally Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Proposed Revision of Procedures, 50 Fed Reg 19,122 (proposed May 6, 1985) (to be codified at 28 CFR pt 51); Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed Reg 486-01 (Jan 6, 1987) (codified at 28 CFR § 51.55). See also Steven F. Lawson, *In Pursuit of Power: Southern Blacks & Electoral Politics, 1965-1982*, 158-90 (Columbia 1985); Kousser, 86 Tex L Rev at 716 (cited in note 155) (“Like the Nixon Administration a decade earlier, the Reagan Administration sought to undermine the VRA, especially Section 5, through guidelines and legal positions espoused in its briefs”).

¹⁵⁷ Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Proposed Revision of Procedures, 50 Fed Reg 19,122, 19,131 (proposed May 6, 1985) (to be codified at 28 CFR pt 51).

¹⁵⁸ Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed Reg 486 (codified at 28 CFR §51.55). See Kousser, 86 Tex L Rev at 718 (cited in note 155).

¹⁵⁹ See, for example, Revisions of the Procedures for the Administration of Section 5 of the Voting Rights Act, 75 Fed Reg 33205 (proposed June 11, 2010) (to be codified at 29 CFR pts 0 and 51).

clarified the nature of DOJ's "bailout" process for covered jurisdictions, including political subunits that were now eligible to bring a declaratory judgment suit under Section Five.¹⁶⁰ In April 2011, the DOJ issued the final rule as an interpretive rule without major changes from the proposal.¹⁶¹

At the same time, numerous accounts have attested to the DOJ's increasingly politicized administration of the VRA across both Republican and Democratic administrations. Various reports have circulated, for instance, suggesting that Bush Administration DOJ officials had prohibited career staff attorneys from offering written recommendations in high-profile VRA determinations.¹⁶² Not only did this new practice "mark[] a significant change in the procedures meant to insulate such decisions from politics," but it also followed on the heels of rare reversals by high-level political officials of career staff preclearance recommendations.¹⁶³ This dynamic of silencing or overruling internal dissent appears to have continued through the Obama Administration,¹⁶⁴ though recent DOJ officials have attempted to publicly distance themselves from such practices and profess to no longer prohibit written career staff opinions.¹⁶⁵ In this manner, the same executive agency which had been silencing its career attorneys had also been issuing guidance that sought to reflect the preferences of the political appointees in power. The Supreme Court's reluctance to grant deference under these circumstances, to agency actors that lacked internal mechanisms of political independence, would be consistent with the analysis developed here.

However persuasive the institutional *Skidmore* approach as an explanatory matter, one might still normatively object to it on the grounds

¹⁶⁰ *Northwest Austin Municipal Utility District v Holder*, 557 US 193 (2009).

¹⁶¹ See Revision of Voting Rights Procedures, 76 Fed Reg 21,239 (April 15, 2011); Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed Reg 7470 (Feb 9, 2011).

¹⁶² See Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, Wash Post A3 (Dec 10, 2005); Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 Harv L & Pol Rev 211, 218–19 (2008); Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How L J 785, 799 (2006) (describing criticism of DOJ's decision not to object to "Republican-backed electoral changes in Texas and Georgia against the advice of career staff"); Thomas Perez, *U.S. Department of Justice's Enforcement of the Voting Rights Act*, 64 Rutgers L Rev 939, 941 (2012) (reporting "the longstanding tradition in the Voting Section in both Republican and Democratic administrations for decades until it was changed in 2005 to exclude career attorneys and analysts from full participation in the process," including career staff who "were directed to no longer put their recommendations in writing").

¹⁶³ See Eggen, *Staff Opinions Banned in Voting Rights Cases*, Wash Post at A3 (cited in note 162); Mark Posner, *Evidence of Political Manipulation at the Justice Department: How Tom DeLay's Redistricting Plan Avoided Voting Rights Act Disapproval*, FindLaw.com (Dec 6, 2005), online at http://writ.news.findlaw.com/commentary/20051206_posner.html (visited Jan 11, 2014).

¹⁶⁴ See J. Christian Adams, *Internal DOJ Documents Argued for SC Voter ID Approval . . . but Obama Appointees Overruled*, PJ Media (Sept 11, 2012), online at <http://pjmedia.com/jchristianadams/2012/09/11/doj-documents-argued-for-sc-voter-id-approval> (visited Jan 11, 2014) (President Obama's political appointees in the DOJ made the decision to object to preclearance of the South Carolina voter ID law over the recommendation of career DOJ lawyers and supervisors).

¹⁶⁵ See Perez, 64 Rutgers L Rev at 940–41 (cited in note 162) (as Assistant Attorney General for DOJ's Civil Rights Division, announcing that DOJ had ended the previous practice of not allowing career staff attorneys from offering written recommendations in voting rights cases).

that it would result in the heightened probability for internal agency actor capture. Because courts would place a thumb on the scale for sub-regulatory guidance documents written by, say, senior career staff, independent general counsels, or advisory committee members, political parties would simply refocus their lobbying efforts accordingly. While this possibility is a real concern, the objection is muted first by the observation that reputations for election administrators are strongly dependent on their perceived independence from special interests and adherence to professional norms.¹⁶⁶ To be an effective election administrator depends on maintaining actual and perceived independence from parties and candidates.

In addition, the incentives for capture are mitigated by various federal laws limiting the influence of interest groups and parties on civil servants. The Pendleton Act, for example, prohibits agencies from making certain non-merit-based personnel actions and sends appeals of such decisions to an independent Merit Systems Protection Board.¹⁶⁷ Moreover, the Hatch Act restricts executive branch civil servants from engaging in partisan political activity.¹⁶⁸ If there was evidence in the record to suggest that the internally insulated agency actor was in fact captured, the proffered interpretation would be less persuasive under *Skidmore*.

By the same token, another objection might be that political appointees would now be more likely to increase their monitoring and control of staff memoranda, thereby undermining existing opportunities for publicly available expertise. If courts are more likely to defer to informal opinions from institutionally insulated actors, that is, then agency heads may simply reduce the amount of otherwise useful guidance, as occurred with the DOJ's silencing of career staff written opinions. More problematically, individual political appointees may even attempt to directly edit or manipulate the contents of such documents themselves.

In such circumstances, again, note that any evidence of political manipulation would render staff interpretations non-persuasive. As for potentially silenced expertise, political appointees are often constrained by powerful norms of independence and internal institutional practices like the DOJ written career staff opinions developed to instantiate them.¹⁶⁹ The DOJ, for its part, was heavily criticized in the media and elsewhere for the perceived politicization of the VRA.¹⁷⁰ In this manner, the credibility and reputation of election-related agencies may serve as a longer-run check on

¹⁶⁶ See, for example, Robert S. Montjoy, *An Ecological Approach to Election Reform*, 8 Election L J 59, 62 (2009) (favorably noting state elections director, a civil service appointee who had won “high marks from local election administrators for timely and professional advice”).

¹⁶⁷ An Act To Regulate and Improve the Civil Service of the United States, Ch 27, 22 Stat 403 (1883); 5 USC §§ 2301–05 (2000); 5 USC §§ 1201–09 (2000).

¹⁶⁸ See 5 USC §§ 1501–08 (2012)

¹⁶⁹ See Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum L Rev 1163, 1212–13 (2013).

¹⁷⁰ See notes 162–164.

efforts to otherwise stifle internally insulated actors. Moreover, staff recommendations are not only made internally to high-level officials, but are also required by the need to provide guidance to outside regulated entities. As a result, there will always be an external demand for sub-regulatory guidance despite internal pressures not to issue any. Finally, such staff manipulations would be particularly difficult under multi-member commissions since other commissioners could object to such efforts.

One might nevertheless still be concerned about the possible dynamic effects of this deference regime. Perhaps judicial deference to senior career staff when they are structurally insulated would erode these norms of independence over time or essentially entrench partisanship even deeper within the agency. The best response may simply be a pragmatic one. The more an election-related agency loses its institutional credibility, either because of capture, corruption, or a failure to incorporate new data, the more likely other institutions like the courts or the legislature may be to step in to check it. This dynamic, as discussed, is one possible explanation for the Supreme Court's refusal to grant deference to an increasingly politicized DOJ. A similar argument has been made to explain the Court's withholding of deference from the EPA's refusal to curb greenhouse gas emissions — namely, because of the Court's perception that there had been high-level political interference with the expert, scientific judgments of EPA career staff.¹⁷¹

More broadly, these worrisome possibilities may be alleviated by other strategic internal incentives. Namely, the commissioners tempted to silence or otherwise unduly influence the recommendations of their staff are faced with a tradeoff between reaching a bipartisan decision and gaining *Chevron* deference, which favors the agency, or settling for *Skidmore* deference, which leaves interpretive authority with the courts. Faced with this choice, the appointed commissioners can gain more deference by securing a majority agreement, instead of leaving open the ambiguity to the uncertainties of *Skidmore* as a result of partisan deadlock. In this manner, there are relative incentives for commissioners to avoid administrative impasse and devote resources to finding bipartisan interpretations rather than micromanaging informal staff documents.

¹⁷¹ See notes 152-153 and accompanying text; Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 S. Ct. Rev. 51, 61.

IV. FEDERAL ELECTION ADMINISTRATION

Ongoing litigation regarding Arizona’s proof-of-citizenship requirements, as in a recent case brought against the EAC itself, will continue to highlight the intersection between federal election and administrative law.¹⁷² Among other issues will be the question identified by Justice Scalia in *Intertribal* — now arising out of legislative, as opposed to administrative, deadlock: Can agencies without any appointed commissioners still act on behalf of the agency? To date, in response to a court order, the professional staff of the EAC has issued a memorandum arguing that the staff possesses the sub-delegated authority under the circumstances to resolve state requests to amend the federal form.¹⁷³ In light of recent changes to filibuster rules, the issue may soon become moot as a practical matter if Congress moves ahead on potential EAC nominations.¹⁷⁴ Other important issues to be resolved include whether and when the EAC’s decisions can be considered final, reviewable actions under the APA.

While this article’s analysis of the comparative institutional competence of insulated career staff may help to bolster the EAC’s arguments going forward, this final Part offers some broader reflections about how administrative law may be adapted in the electoral context — themes to be more fully developed in future work. Indeed, administrative law, as traditionally conceived, is trans-substantive. It presumes principles generally applicable across a number of agencies and formulates its doctrines accordingly.¹⁷⁵ There are many reasons to think, however, that such doctrines should be adapted to the election administration context in ways that recognize the domain’s unique concerns.

¹⁷² See *Kobach v. The United States Election Assistance Commission*, 13-cv-04095 (D Kan 2013).

¹⁷³ Election Assistance Commission, Memorandum of Decision Concerning State Requests to Include Additional Proof of Citizenship Instructions On the National Mail Voter Registration Form 14-20 (Jan 17, 2014), online at <http://www.eac.gov/assets/1/Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf> (last visited Jan 12, 2014).

¹⁷⁴ See Committee on Rules and Administration, Election Assistance Commission Nomination Business Meeting, online at http://www.rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord_id=cebb0cf6-c060-43b3-a600-ea6eaa00693c&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=1983a2a8-4fc3-4062-a50e-7997351c154b&MonthDisplay=2&YearDisplay=2014 (last visited Feb 5, 2014).

¹⁷⁵ See Richard E. Levy and Robert L. Glicksman, *Agency-Specific Precedents*, 89 Tex L Rev 499, 499–500 (2011) (“As a field of legal study and practice, administrative law rests on the premise that legal principles concerning agency structure, administrative process, and judicial review cut across multiple agencies” and noting that the “premise certainly holds true for iconic administrative law decisions like *Chenery*, *Overton Park*, *Florida East Coast Railway*, *Vermont Yankee*, *State Farm*, and *Chevron*, which are widely cited and applied”) (citations omitted); Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law From Jackson to Lincoln, 1829–1861*, 117 Yale L J 1568, 1688 (2008) (observing that the “jurisprudence generated through judicial review of administrative action enunciates general principles and is almost necessarily transsubstantive,” which are then reinforced by “framework statutes, like the Administrative Procedure Act or the National Environmental Policy Act, and from executive orders such as those that have incrementally established the regulatory review process at the Office of Management and Budget”).

In recent years, judges and scholars alike have begun to recognize the potential wisdom of such tailored approaches. Richard Levy and Robert Glicksman, for example, observe a phenomenon they call “agency-specific precedents.”¹⁷⁶ Precedents are agency-specific when a court only cites them for a particular agency in other cases involving that agency, even when the cited principles are supposedly general in nature. What is particularly striking about the practice is that courts have begun to modify these principles to accommodate particular agency characteristics.¹⁷⁷ One traditional articulation of arbitrary-and-capricious review, for example, asks “whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁷⁸ In the narrow contexts of the Federal Communications Commission and Federal Energy Regulatory Commission, however, Levy and Glicksman note that courts regularly invoke a different verbal formulation — simply that of “reasoned decisionmaking.”¹⁷⁹ They argue that this alternative approach emphasizes a more rational decision-making *process*, as opposed to a focus on the substance of the decision itself. One potential explanation they offer is that the agencies at issue engage in ratemaking and licensing in regulated industries, which place a greater emphasis on procedural protections.¹⁸⁰

To the extent courts are already *de facto* adapting administrative law principles to the shared concerns of particular agencies, a related possibility is that such customization should recognize the unique problems of federal election administration. The idea arises from the analogous argument that the exceptional nature of elections warrants particularized constitutional doctrines. In this view, the First Amendment, for example, should give some kinds of electoral speech less protection relative to non-electoral speech in order to facilitate the heightened contest of ideas during election season.¹⁸¹ The Equal Protection Clause too has received election-specific

¹⁷⁶ Levy and Glicksman, 89 Tex L Rev at 500 (cited in note 175).

¹⁷⁷ *Id.*

¹⁷⁸ *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 416 (1971); *Motor Vehicle Mfrs. Assn v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 59, (1983). Another common formulation asks whether the agency “relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered ‘an explanation [for its decision] that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Id.*

¹⁷⁹ Levy and Glicksman, 89 Tex L Rev at 529–34 (cited in note 175).

¹⁸⁰ *Id.* at 532–33. More broadly, Levy and Glicksman posit that agency-specific precedents can be explained in part by the “silo effect” created by attorney and judicial specialization. *Id.* at 558–59. They also acknowledge that the phenomenon derives from variations in agency organic statutes and programs. *Id.* at 572. Relatedly, a third explanation is likely the D.C. Circuit’s familiarity with particular agency’s reputations and historical institutional concerns; indeed, the circuit is well-known for its repeated experience with agency litigants and their recurring issues. See John G. Roberts Jr, *What Makes the D.C. Circuit Different? A Historical View*, 92 Va L Rev 375, 376–77, 388–89 (2006).

¹⁸¹ See Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex L Rev 1803, 1806 (1999) (characterizing the “most common version of electoral exceptionalism” as permitting restrictions on communicative activity in the context of elections that would not be permitted in other contexts”). See also Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, in M. Youn, ed, *Money, Politics, and the Constitution: Beyond Citizens United* 19, 19 (Century Foundation 2011) (“Elections are distinct

modifications. The Supreme Court’s recent redistricting cases, for instance, have allowed for more race-conscious line-drawing than in other equal protection arenas, with the Court adopting a “predominant” factor rather than a “motivating” factor test for identifying impermissible racial motive.¹⁸² One rationale is that voters voluntarily identify by race when forming political organizations, thus necessitating the recognition of legitimate group interests in the redistricting process.¹⁸³ Similarly, *Baker v. Carr*’s one-person, one-vote standard is unique as one of the only contexts in which strict scrutiny is applied in the absence of a discriminatory purpose or suspect classification and has “imposed a mathematical rigor on the redistricting process that no other species of equal protection law required.”¹⁸⁴ Partisan gerrymandering doctrines too allow the state to intentionally disadvantage the otherwise constitutionally protected characteristic of political affiliation.¹⁸⁵

These election-specific constitutional doctrines also have statutory analogues. Richard Hasen, for instance, identifies “democracy canons” of interpretation in state courts and advocates their use in federal settings as well.¹⁸⁶ Such canons generally seek to “give effect to the will of the majority” and “prevent the disenfranchisement of legal voters” when election-related statutes are otherwise ambiguous.¹⁸⁷ When applied, they usually counsel in favor of allowing ballots to be cast and counted and to enable candidates to appear on ballots.¹⁸⁸ Just as constitutional and statutory concerns might take on novel dimensions when elections are at issue, so too might administrative law’s worries about non-arbitrariness, transparency, and reasoned decision-making, among others. What works wholesale, that is, may need retail-level refinement.

Indeed, one of administrative law’s central concerns is how to legitimate government action by an unelected bureaucracy through doctrines and procedures grounded in both political accountability and

from the more general arena of democratic debate, both because elections serve a specific set of purposes and because those purposes can, arguably, be undermined or corrupted by actions such as the willingness of candidates or officeholders to trade their votes on issues for campaign contributions or spending.”); Geoffrey R. Stone, “*Electoral Exceptionalism*” and the First Amendment: A Road Paved with Good Intentions, 35 NYU Rev L & Soc Change 665, 667 (2011).

¹⁸² Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 BU L Rev 737, 740 (2002), citing *Easley v. Cromartie*, 532 US 234, 241 (2001) (“Race must not simply have been a motivation for the drawing of a majority-minority district . . . but the predominant factor motivating the legislature’s districting decision.” (internal quotation marks and citation omitted)); *Miller v. Johnson*, 515 US 900, 915–16 (1995) (stating that the “plaintiff’s burden is to show . . . that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”).

¹⁸³ See *Baker v. Carr*, 369 US 186 (1962); Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 Cal L Rev 1201, 1218 (1996).

¹⁸⁴ Karlan and Levinson, 84 Cal L Rev at 1201.

¹⁸⁵ *Id.*

¹⁸⁶ See Richard L. Hasen, *The Democracy Canon*, 62 Stan L Rev 69, 73, 92, 106 (2009). See also Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 Cornell L Rev 1051 (2010).

¹⁸⁷ See Hasen, 62 Stan L Rev at 77 (cited in note 186).

¹⁸⁸ *Id.* at 83–84.

expertise. Along the first dimension, the non-delegation doctrine, for instance, requires that broad delegations of legislative power are constrained by an “intelligible principle”¹⁸⁹ to which legislators can be held responsible. Given Congress’ broad delegations in practice, however, the President has also become an important locus of accountability, particularly through his appointment, removal, and review powers.¹⁹⁰ Central to these accountability-grounded accounts is the notion that federal elections can help to ensure that regulatory policies are responsive to the democratic will.

In the context of election regulation, however, the political control model falters. Instead of relying on elections as an exogenous check on the regulatory process, election administration influences the election outcomes themselves. As a result, there is a potential circularity: the very source of legitimacy for the agency action is a function of the agency action itself. In these circumstances, elections are a less reliable check on agency decision-making when they instead reflect partisan efforts to distort signals of voter approval or disapproval.¹⁹¹ Related are familiar fears of partisan entrenchment, the worry that an appointed administrator can manipulate the voting process to keep their favored party in power.¹⁹²

Potentially more appropriate, then, is another familiar framework for justifying the delegation of policymaking authority: one grounded in the agency’s superior expertise and experience. Hard look review helps to ensure that agencies make factual and scientific judgments based on the evidence available in the record.¹⁹³ Indeed, as this article has argued, federal election administration can benefit greatly from states’ experiences as well as from lessons learned from previous federal election cycles.¹⁹⁴ Many of the recent debates about voter identification revolve around contested facts regarding the true rates of voter fraud or racial disenfranchisement. In response, some have proposed information-forcing reforms such as electoral impact statements¹⁹⁵ or the application of risk

¹⁸⁹ See *Whitman v American Trucking Associations*, 531 US 457, 472 (2001), citing *J.W. Hampton, Jr, & Co v United States*, 276 US 394, 409 (1928).

¹⁹⁰ See Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2328 (2001).

¹⁹¹ See Zipkin, 95 Marq L Rev at 692 (cited in note 6).

¹⁹² See Issacharoff and Pildes, 50 Stan L Rev 643 (cited in note 2).

¹⁹³ *Motor Vehicle Manufacturers’ Association v State Farm*, 463 US 29, 43 (1983) (quoting *Burlington Truck Lines, Inc v United States*, 371 US 156, 168 (1962)).

¹⁹⁴ In this vein, Heather Gerken has marveled at the lack of data regarding election performance indicators — including the lack of information about how many voting machines malfunctioned during an election cycle, how long voters had to stand in line, and how many ballots were discarded — and has proposed a performance index in response. See Heather K. Gerken, *The Invisible Election: Making Policy in a World without Data*, 35 Ohio N U L Rev 1013, 1024 (2009) (calling the lack of data in election administration the “mysterious outlier”); Heather K. Gerken, *The Democracy Index: Why our Election System is Failing and How to Fix It* (Princeton 2009).

¹⁹⁵ See, for example, Issacharoff, 127 Harv L Rev at 121–23 (cited in note 6); Bruce Cain and Daniel P. Tokaji, *Promoting Equal Participation: A Voting Rights Act for the 21st Century*, Election L Blog (June 23, 2009), online at <http://electionlawblog.org/archives/013914.html> (visited Jan 11, 2014) (proposing “‘electoral impact statement,’ analogous to environmental impact statements”). See also Spencer Overton, *How to Update the Voting Rights Act*, Huffington Post (June 25, 2013), online at <http://www.huffingtonpost.com/spencer-overton/how-to>

regulation principles.¹⁹⁶ In this manner, the legitimacy of a federal election agency depends heavily on its ability to rationalize and inform electoral administration.

At the same time, purely non-partisan rationales grounded solely in expertise may be naïve in a context where administrators are appointed or hired by individuals with partisan affiliations.¹⁹⁷ Many election regulations also require line-drawing exercises — as in *Intertribal*'s question of how much information is “necessary” to enforce voter qualifications — which often cannot be answered by reference to pure expertise, but are rather discretionary exercises of judgment. As a result, election administration may also need other sources of legitimacy.

Perhaps one possibility suggested by this article's analysis is that of bipartisanship, the extent to which a regulatory decision has been agreed to by both political parties in a two-party system. This criteria would mirror the structural choices made by Congress for agencies like the FEC and EAC, as discussed. Relative to single party domination, bipartisan decisions may be less suspect given the greater prospect of decisions based on the public interest rather than narrowly partisan grounds. Since they require the approval of two parties, bi-partisan decisions are more likely to concern the electoral system as a whole, rather than attempts to disadvantage a particular party. Privileging bipartisan requirements may also contribute to greater stability over time since they render less likely sudden policy shifts due to contingent situations of unified government.¹⁹⁸

The danger with bipartisan decisions, however, arises from the concern that political parties will collude to weaken the political process at the expense of voters. Some have argued that this danger is particularly acute in the redistricting context, though empirical evidence may suggest that such concerns are overstated.¹⁹⁹ Because of such worries, neither bipartisan, nor expert, non-partisan considerations may be sufficient legitimizing rationales on their own. Rather, perhaps they must operate in tandem as proxies to guard against arbitrary regulatory policies designed to entrench. A lack of bipartisanship, for instance, might invite a heightened judicial review of the evidence-based rationale for a change in electoral

update-the-voting_b_3497350.html (visited Jan 11, 2014) (proposing disclosure measures as means to modernize the VRA).

¹⁹⁶ See S. Cooper Hawley, Comment, *Applying Risk Regulation Principles to New Policy Domains: A Case Study on Voter Identification Laws*, 48 Wake Forest L Rev 515 (2013).

¹⁹⁷ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv L Rev 649, 674 (2002) (in the context of redistricting, noting that “[w]hoever draws the lines must get authority from somewhere — the person will either be appointed or elected”).

¹⁹⁸ See Elmendorf, 95 Cornell L Rev at 1065 (cited in note 186 (“a two-party system in which the rules of electoral competition are regularly updated in a generally bipartisan fashion seems likely to be more stable than a system in which the rule remain static for long periods and are updated in partisan bursts whenever one party controls the legislative and executive branches”).

¹⁹⁹ Compare Issacharoff, 116 Harv L Rev 593 (cited in note 2) with Persily, 116 Harv L Rev 649 (cited in note 197).

regulation. Conversely, the presence of bipartisanship might warrant only ordinary arbitrary-and-capricious review of the underlying supporting data and evidence.²⁰⁰

CONCLUSION

Prior to last Term, election law observers had presciently predicted that the future of voting rights would shift from the VRA's anti-discrimination model towards more national, uniform approaches that "better fit" the increasingly recognized need for consistency across electoral jurisdictions.²⁰¹ Recent events such as the establishment of a presidential commission to address federal election administration further signal the potentially expanding regulatory presence in this domain.²⁰² As the *Intertribal* litigation suggests, a federal approach also brings it with the greater need for high-quality information and data to justify alternative regulatory approaches. This need is highlighted by the self-professed difficulties courts face in gaining this information.

To confront this challenge, this article has sought to highlight some potentially fruitful intersections between administrative and election law. Faced with deadlocks unique to the election context, the analysis developed an approach to *Skidmore* deference that would push courts to focus on the information and expertise gained by experienced institutional actors who could bring a more birds-eye view across various electoral jurisdictions. Future litigation arising out of *Intertribal* will continue to test the limits of judges' abilities to sort through limited factual records. At the same time, it will rightly bring the dispute firmly back to administrative arenas with the tools and doctrines that can help to foster the legitimacy that federal election administration demands.

²⁰⁰ Note that this approach is analogous to another that has been advocated by individual Justices in the context of multi-member commissions, though it has not been adopted by the Court. In *FCC v. Fox*, Justice Breyer joined by Justices Ginsburg, Stevens and Souter noted that an independent "agency's comparative freedom from ballot-box control" merited a particularly searching review of the agency's policy change. In this sense, judicial and political review could serve as substitutes. See *FCC v. Fox*, 556 US 502, 547 (2009). See also Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 Admin L Rev 429 (2006); Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 Admin L Rev 433 (2010).

²⁰¹ See Richard A. Pildes, *Voting Rights: The Next Generation*, in Guy-Uriel E. Charles, Heather K. Gerken, and Michael S. Kang, eds, *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* 17, 18 (Cambridge 2011).

²⁰² See Exec Order 13639, *Establishment of the Presidential Commission of Election Administration*, 78 Fed Reg 19979 (Mar 28, 2013), online at <http://www.whitehouse.gov/the-press-office/2013/03/28/executive-order-establishment-presidential-commission-election-administr> (visited Jan 10, 2014).

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