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Summer 2023

## Exploring Democratic Accountability in the Administrative State

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# Exploring Democratic Accountability in the Administrative State

JOSHUA ULAN GALPERIN\*

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### I. INTRODUCTION

The title of this symposium—“Assuring Democratic Accountability in the Administrative State”—poses two challenges. The obvious—and substantive—challenge that I assume the organizers intended, was to seek ways to *achieve* democratic accountability. The other—the interpretive challenge—however, comes first: What do we mean by “democratic accountability?” Exploring democratic accountability in this way is what I want to attempt in this essay.

Lawmakers have long considered democratic accountability in the administrative state. The Constitution addresses—though hardly resolves—the question by establishing three co-equal branches and endowing each with distinct sources of authority.<sup>1</sup> One hundred and fifty years later, the Administrative Procedure Act took more direct aim at administrative accountability by establishing procedures to open administrative decision-making to different types of participation.<sup>2</sup> In recent years, the Supreme Court has focused on presidential control of administrative agencies.<sup>3</sup> With the *West Virginia v. EPA* decision in June 2022, the Court shifted its emphasis from executive accountability to judicial oversight.<sup>4</sup> Each

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\* Assistant Professor of Law, Elisabeth Haub School of Law at Pace University. © 2023, Joshua Ulan Galperin.

1. U.S. CONST. art. I; *id.* art. II; *id.* art. III.  
2. 5 U.S.C. §§ 551–559.  
3. See, e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 373 (2022) (discussing *Seila Law, LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), as particular examples of the Court’s focus on presidential control).  
4. See *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

approach has its critics and champions, but it is probably fair to say that these approaches are largely focused on the substantive challenge and often gloss over the interpretive challenge.

Professors Huq and Michaels recognize that “democratic accountability” is a “fraught” and “contested” term.<sup>5</sup> Nevertheless, in recent decades, some scholars have taken the interpretive challenge head on. In her article, “Beyond Accountability,” for instance, Professor Bressman maintains that too much administrative law scholarship “rests on a mistaken assumption about the appropriate role of political accountability in the constitutional scheme”<sup>6</sup> and argues that accountability is the wrong question. Instead of asking whether agencies are sufficiently accountable to the president and, through the president’s electoral authority, to the people, Bressman urges a focus on non-arbitrariness.<sup>7</sup> This approach espouses a broad view of accountability as a combination of electoral majoritarianism *and* non-arbitrary “good government.”<sup>8</sup> In “The Myth of Accountability,” Professor Rubin notes that in an effort to generate more accountable government there have been calls for more decisions to rest with elected officials and more decisionmaking to devolve to the local level.<sup>9</sup> “[N]either of these two ideas,” Rubin writes, “is entitled to invoke the notion of accountability.”<sup>10</sup> Rather, “true accountability, in the realm of law and politics,” according to Rubin, “involves many of the features that are central to the administrative state and that people find so unattractive about it—hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations.”<sup>11</sup> Very recently, Professor Walters advanced a similar argument that administrative processes advance democratic accountability when they create conflict that invites widespread participation and contestation.<sup>12</sup> The thrust of scholarship is that policy discussions about accountability require more thought about what accountability really means. This is the interpretive challenge.

This essay seeks to add to the ongoing effort of defining accountability in practical terms by presenting an inconspicuous but directly on-point case study about administrative accountability. This is the story of the United States Department of Agriculture farmer committee system, which seems to be the one and only

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5. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L. J. 346, 420 (2016).

6. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463 (2003).

7. *Id.* at 463–64.

8. *Id.* at 555.

9. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073–74 (2005).

10. *Id.* at 2074.

11. *Id.* at 2075.

12. Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 15 (2022).

experiment in federal administrative elections.<sup>13</sup> The experiment, however, has been a failure both as a matter of practical policy and constitutional validity. Indeed, in advance of legislative debate on the 2023 Farm Bill, a USDA advisory committee publicly recommended that Congress abolish the committee system.<sup>14</sup> Nevertheless, there is much to learn about the meaning of accountability from these failures, and the lesson, in short, is this: Majoritarianism alone is neither a constitutionally sound form of accountability nor an effective model for good governance. Regardless of whether we call it accountability, legitimacy, democracy, or simply good governance, only when majoritarianism pairs with other tools for meaningful public engagement and oversight—individualism, reason giving, and deliberation—does the administrative state achieve “democratic accountability.”

The next section of this essay describes the history, purpose, and powers of the USDA farmer committees in more detail. Section III will explain the legal and policy failures of this experiment in using direct elections to bring accountability to the administrative state. Section IV present solutions to these failings. Section V will conclude by further exploring democratic accountability in light of the constitutional problems with and solutions to electoral administration.

## II. AN EXPERIMENT IN MAJORITARIAN DEMOCRATIC ACCOUNTABILITY

To explore the meaning of democratic accountability we can turn to the massive but under-studied USDA farmer committee system. Known officially as “county, area, or local committees,”<sup>15</sup> there are over 2,000 of these hyper-local committees made up of almost 8,000 elected farmers.<sup>16</sup> Despite impressions among some farmers<sup>17</sup> and, indeed, occasionally by high-ranking USDA officials,<sup>18</sup> these elected farmer committees are not mere advisors and do more than simply facilitate communication between government officials and farmers on the ground. Rather, the committees have genuine and important duties as policymakers and adjudicators. As policymakers, the farmer committees set jurisdiction-wide rules. For instance, committees promulgate “final planting dates” for various crops. If a farmer plants a crop after the final planting date, that farmer is ineligible for various federal payment programs.<sup>19</sup> So too do the committees adjudicate factual disputes that determine the rights and privileges of farmers operating within their jurisdiction. Thus, continuing the example, if a farmer applies for

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13. Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1216 (2020) [hereinafter *Life of Administrative Democracy*].

14. Brooke Christy, *The Call to Abolish the Farm Service Agency County Committees*, FARM BILL L. ENTER. (Oct. 3, 2022), <https://www.farbilllaw.org/2022/10/03/the-call-to-abolish-the-farm-service-agency-county-committees/> [https://perma.cc/NK74-LATW].

15. 16 U.S.C. § 590h(b)(5)(B).

16. *Life of Administrative Democracy*, *supra* note 13, at 1216.

17. *Id.* at 1249.

18. *Id.* at 1218.

19. *Id.* at 1228.

federal funding, the elected committees can approve or deny that funding based on individual factual determinations such as whether the farmer planted crops in compliance with the final planting date.<sup>20</sup>

In the words of the late Justice Scalia, “it is not of special importance to me what the law says . . . [i]t is of overwhelming importance, however, who it is that rules me.”<sup>21</sup> Indeed, the *law* that elected farmer committees make is of no special importance for today’s purposes. What *is* important is that committees make law at all, given that they are elected. For as long as judges or scholars have written about accountability in the administrative state, they have assumed that agency officials are “unelected federal bureaucrats,” “unelected administrators,” “not elected to fill the role,” and so on and so forth.<sup>22</sup> But the USDA farmer committees do indeed make and implement federal law that impacts millions of farmers across the country.

And they are indeed elected. Congress has created a system in which the Secretary of USDA can create farmer committees,<sup>23</sup> after which committee members are “elected by the agricultural producers that participate or cooperate in programs administered within the area under the jurisdiction of . . . the committee.”<sup>24</sup>

That Congress has created this genuine electoral system for federal administrators is notable for at least two reasons. First, as I mentioned above, most experts are unaware that there are any examples of elected federal administrators. Second, they are unique in that they are the only example of elected administrators of federal law. Directors within the Federal Home Loan Bank system are selected through an election process,<sup>25</sup> as are members of Housing and Urban Development resident councils.<sup>26</sup> State labor statistics directors elect an expert committee to work within the Department of Labor,<sup>27</sup> and grazing advisory boards are made up of elected ranchers.<sup>28</sup> In all these examples of elected participants in the federal bureaucracy, none of the elected individuals or bodies have the power to make or enforce federal law.<sup>29</sup> The inverse of these examples are the

20. *Id.*

21. *Obergefell v. Hodges*, 576 U.S. 644, 713 (2015) (Scalia, J., dissenting).

22. Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 2 (2020) [hereinafter *Death of Administrative Democracy*] (citing *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); *I.N.S. v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting); *City of Arlington v. F.C.C.*, 569 U.S. 290, 305 (2013); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010); *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2134 (2019) (Gorsuch, J., dissenting); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3 (2008); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 43–45 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2262–63, 2331 (2001)).

23. 16 U.S.C. § 590h(b)(5)(B)(i)(I).

24. 16 U.S.C. § 590h(b)(5)(B)(ii)(I)(bb).

25. 12 C.F.R. § 1261.3(c) (2021).

26. 24 C.F.R. § 964.11 (2022).

27. 29 C.F.R. § 44.1 (2021).

28. 36 C.F.R. § 222.11(b) (2021).

29. *Life of Administrative Democracy*, *supra* note 13, at 1217.

USDA commodity committees: While they have real legal authority, and are *almost* elected, their elections are merely advisory.<sup>30</sup> In the commodity committee system, farmers vote on a slate of would-be committee members, which they then present to the Secretary of Agriculture who, ultimately, appoints members from that list.<sup>31</sup> Accordingly, though this example presents real administrators, it does not, at least in a formal sense, contain real elections.

Taken together, this shows that farmer committees are the only real example of elected administrators within the federal government. Because the calls for democratic accountability in the administrative state are often calls for a majoritarian connection, through the President, Congress, or a direct connection to voters, these committees provide a unique case study for understanding “democratic accountability” in the administrative state.

With calls for democratic accountability and a background against which to better understand what democratic accountability can mean in practice, the next section carries this case study forward by demonstrating that the elected farmer committee system is untenable as a legal and practical matter.

### III. A FAILURE OF MAJORITARIANISM

Elected farmer committees are “majoritarian” because the primary source of authority comes from elections rather than, for example, some notion of rationality, which one could argue is the basis for judicial authority, or perhaps subject-matter expertise, which may form the basis for some other administrative bodies.

For some, a direct connection between voters and administrators is the epitome of “democratic accountability.” And in recent years, the Supreme Court has been unequivocal about the need to connect administrators to voters: “For instance, the *Free Enterprise Fund* Court wondered how an administrative agency could exercise power ‘in the people’s name’ when that agency is not meaningfully controlled by the President, who is the manifestation of the people’s will.”<sup>32</sup> The Court explained that because the “people do not vote for [administrators],”<sup>33</sup> the administrators only have constitutional authority to the extent the president has supervisory authority since the president is “chosen by the entire Nation.”<sup>34</sup> In this light, the elected farmer committees are interesting simply because of the unique electoral structure that links administrators directly to voters. Their majoritarian roots, however, run deeper and get tangled and complicated.

Voters elect the committees, but the committees exist within the federal government, where the voters also elect the president—who must oversee the

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30. *Id.* at 1217–18.

31. *See, e.g.*, 7 C.F.R. § 905.23(a) (2022) (stating the Secretary “shall” select members from the list of elected nominees “or from other qualified persons” for the commodity committee of certain Florida farmers); 7 C.F.R. § 906.22 (stating the Secretary “shall” select members of the commodity committee for certain Texas farmers).

32. *Death of Administrative Democracy*, *supra* note 22, at 41.

33. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010).

34. *Id.* at 499.

committees<sup>35</sup>—and where voters elect Congress—which must initially empower the committees.<sup>36</sup> The committees are thus beholden to three distinct electorates, three distinct fonts of majoritarian empowerment. This triple-majoritarianism presents both a legal and a practical paradox, each contributing to the failure of the elected committees, rather than to any vision of pure and robust accountability.

The legal paradox is that the voters who directly elect the committees shall not, as a legal matter, hold the committees accountable. In other words, the unique electoral structure is not a constitutionally valid form of democratic accountability. Lawyers could (and perhaps will) write many briefs on this subject, but the appointment and removal doctrines demand a substantial degree of presidential control over administrative agencies.

The Constitution demands that the president, the head of an agency, or an Article III court appoint administrative officers who have substantial and continuing legal authority.<sup>37</sup> The president does not appoint the farmer committees, nor does the head of the agency, nor does an Article III court.<sup>38</sup> Rather, the voters in each jurisdiction appoint the members of the farmer committees.<sup>39</sup> The elected committees are “officers” to whom the Appointments Clause applies because Congress has granted them substantial and permanent adjudicative and rule-making authority, but the Appointment Clause does not recognize the direct election of federal officers.<sup>40</sup> The electoral appointment structure is therefore unconstitutional.

The Supreme Court has held that the president must have substantial authority over firing agency officials.<sup>41</sup> Although the president need not have direct firing authority, there may not be more than one step between an administrative official and the presidential removal power.<sup>42</sup> As with the appointment doctrine, the electoral structure of the farmer committees also challenges the Supreme Court’s rules around presidential removal authority. Congress created an electoral structure to constitute the committees and imposed three-year terms.<sup>43</sup> The statute does not explicitly discuss the removal of committee members, but an election implies that voters can remove elected officials at the end of a term by voting for a different candidate. In more traditional administrative structures, the

35. *See, e.g.,* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (explaining that the president must have oversight of administrative agencies because of the president’s electoral authority).

36. *See, e.g.,* *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2607–08 (2022) (explaining that agencies can act only under the authority Congress grants).

37. U.S. CONST. art. II, § 2, cl. 2.

38. 16 U.S.C. § 590h(b)(5)(B)(ii)(I)(bb).

39. *Id.*

40. *Death of Administrative Democracy*, *supra* note 22, at 39.

41. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010).

42. *Free Enter. Fund*, 561 U.S. at 484.

43. 16 U.S.C. § 590h(b)(5)(B)(iv).

assumption is that the entity with appointing power also has removal power.<sup>44</sup> Under this reading of the statute, where voters have removal authority, the president has no control over the removal process. Thus, the majoritarian electoral structure is also unconstitutional under removal doctrine.<sup>45</sup>

The structure of the elected farmer committees is unconstitutional under the current appointment and removal doctrines. The structure is unconstitutional because it relies too heavily on one majoritarian entity, the electorate, at the expense of another, the presidency. That is one of the paradoxes. By establishing a direct connection between administrators and voters, Congress has inadvertently run afoul of the Court's appointment and removal doctrines, each significantly shaped by the Court's desire to make administrators *more* responsive to majoritarian governance.

The practical paradox is that when Congress grafted an electoral system onto an administrative agency in the Executive Branch, it inadvertently imposed two supervisors, quite likely with different priorities, making it impossible for the committees to operate effectively. Since the voters appoint and remove members of the farmer committees, the committees are more likely to respond to voter demands. This is, after all, why so many commentators believe connecting decision-makers to voters is the best form of democratic accountability. However, as a constitutional matter, the committees are legally obligated to adhere to Congress' statutory standards and the USDA's regulatory standards. What is a committee to do when the voters want more generous disaster payments but Congress or the USDA has made payments more difficult to come by in attempt to control the budget? Perhaps the elected county committees do have a great deal of democratic accountability, but accountability to whom?

These two paradoxes have led to three very real problems in how the committees do their jobs. First, the committees are not very good at doing what they've been elected to do: administer the law. While elections promise the winner is popular, they do not ensure the elected administrators have the requisite skills to manage significant federal programs. From the earliest days of the farmer committees, critics have complained that electing non-professional administrators is a mistake because it "structurally defies the fundamental rules of public administration."<sup>46</sup> Just because a farmer is popular, or even a great farmer, does not mean

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44. See, e.g., *Myers v. United States*, 272 U.S. 52, 119 (1926) (noting that the power of removal is tied to the power of appointment); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 552 (2018) ("[T]he appointing official is considered to have the removal power unless otherwise specified by statute.").

45. *Seila Law*, 140 S. Ct. at 2203. By regulation, USDA purports to grant authority to remove committee members to an official within USDA. 7 C.F.R. § 7.29(a). But a close reading of the law that creates the committees and provides USDA rulemaking authority shows that this regulatory removal provision is invalid and that the elections alone provide the mechanism for removal. *Death of Administrative Democracy*, *supra* note 22, at 27.

46. Reed L. Frischknecht, *The Democratization of Administration: The Farmer Committee System*, 47 AM. POL. SCI. REV. 704, 716 (1953).



they have the skill set to implement federal law.<sup>47</sup> A 1962 government report similarly urged that the committees' "competence for administration should be more firmly secured."<sup>48</sup>

Today, these problems are still evident. The elected committees have been subject to significant litigation focused not on their substantive decision-making, but on their inability to do their jobs. "[C]ommittees apparently failed to verify claimed loss amounts, never responded to applications for federal program support, misunderstood the legal importance of an appeal that overturned their own adjudicatory decision, and, more remarkably, refused to conform to orders of a supervisory body within the USDA."<sup>49</sup>

The second problem with how the elected committees function on the ground is that the elections are troublingly unpopular. Perhaps if the committee members faced more public scrutiny the elections would provide more effective accountability, but the committees face almost no scrutiny from voters. Although the committees play an important role in local implementation of federal farm policy, there are farmers, and even farm advocacy organizations, who do not realize the committees exist.<sup>50</sup> In addition, USDA voting data from recent decades shows that voter turnout for committee elections is about nine percent, with turnout peaking at fifteen percent.<sup>51</sup> In all likelihood, if you ask a farmer about how they can hold the federal government accountable on farm policy, they will talk about presidential or congressional elections, not the arcane poll for local farmers sitting on local committees.

The third and most important problem with the real-world behavior of the elected committees is that they have a long and ugly history of racism and classism. At the outset, the Roosevelt Administration promoted the committee structure as a way to assure wealthy white farmers that even though New Deal programs would bring significant changes to the economics of agriculture, they would not cause an upheaval in the economic or racial hierarchy of agriculture.<sup>52</sup> Thus, the USDA tended to share information and money only with wealthy white

47. *See id.* at 713.

48. U.S. DEP'T OF AGRIC., AGRIC. STABILIZATION & CONSERVATION SERV., REVIEW OF THE FARMER COMMITTEE SYSTEM: REPORT OF THE STUDY COMMITTEE 5 (1962).

49. *Life of Administrative Democracy*, *supra* note 13, at 1249 (internal citations omitted).

50. *See* Telephone Interview with Cara Fraver, Bus. Servs. Dir., Nat'l Young Farmers Coal. (Mar. 11, 2019); Ivan Garth Youngberg, *Federal Administration and Participatory Democracy: The ASCS Farmer Committee System* 164 (Aug. 1971) (Ph.D. dissertation, University of Illinois at Urbana-Champaign).

51. U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, 2014 FARM SERVICE AGENCY COUNTY COMMITTEE ELECTION REPORT (2014), [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/election-results/2014\\_election\\_results.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/election-results/2014_election_results.pdf) [<https://perma.cc/MU6J-XL8N>]; U.S. DEP'T OF AGRIC., FARM SERV. AGENCY, TOTAL BALLOTS CAST BY RACE, ETHNICITY, AND GENDER IN 2006 (2006) <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/election-results/2006electionresults.pdf> [<https://perma.cc/6KT3-6T3E>].

52. Wayne D. Rasmussen, *New Deal Agricultural Policies After Fifty Years*, 68 MINN. L. REV. 353, 354 (1983); PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS* 9 (2013).

farmers, effectively, if not legally, cutting Black farmers out of the process.<sup>53</sup> In many areas, Black, female, and poor farmers were actively excluded from the electoral process, and in many others they were (and are) political minorities that were not represented after the votes were counted.<sup>54</sup> In 1965, the U.S. Commission on Civil Rights authored a report with a full section focused on the role of the farmer committees in anti-Black racism.<sup>55</sup> The report was damning. It discovered that only 0.2 percent of the thirty-seven thousand elected committee members in the South were Black, despite a relatively large number of Black farmers in the South.<sup>56</sup> Even that paltry representation was a substantial increase over earlier years thanks to the presence of civil rights organizers in the region.<sup>57</sup>

Once the racially exclusive committees were cemented, their operation reflected structural discrimination. The 1965 Civil Rights Report described instances of committees actively providing federal benefits to white farmers but not to Black farmers. When farmers would request additional federal allotments allowing them to grow and market crops, the all-white committees would provide much smaller allotments to Black than white farmers.<sup>58</sup> In 1967, one commenter bluntly stated that if the elected farmer committee system “survives in its present form, it can only hinder the advance of human rights and racial harmony in the South and in the nation as a whole.”<sup>59</sup>

The unjust and inequitable behavior of the elected farmer committees did survive. In 1997, the USDA’s own Civil Rights Action Team released a report that continued to detail widespread racial discrimination in the committee system.<sup>60</sup> As recently as Fall 2022, the USDA’s Equity Commission recommended that Congress abolish the electoral system specifically because of how it has perpetrated, and continues to perpetrate, inequality in agriculture.<sup>61</sup>

Another important feature of the 1997 USDA report is that it linked the ongoing discrimination to the committees’ electoral structure. The report described “a county committee system that shuts out minorities and operates for

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53. DANIEL, *supra* note 52, at 12, 32–33. *See also, e.g.*, Louis Cantor, *A Prologue to the Protest Movement: The Missouri Sharecropper Roadside Demonstration of 1939*, 55 J. AM. HIST. 804, 809 (1969); Nathan A. Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL’Y 12, 14 (2017).

54. DANIEL, *supra* note 52, at 28; Cantor, *supra* note 53, at 809, 822.

55. U.S. COMM’N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 91–97 (1965).

56. *See id.* at 92.

57. *Id.*

58. *Id.* at 45.

59. Note, *The Federal Agricultural Stabilization Program and the Negro*, 67 COLUM. L. REV. 1121, 1136 (1967).

60. *See generally* CIVIL RIGHTS ACTION TEAM, U.S. DEP’T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE (1997).

61. Brooke Christy, *The Call to Abolish the Farm Service Agency County Committees*, FARM BILL L. ENTER. (Oct. 3, 2022), <https://www.farmbilllaw.org/2022/10/03/the-call-to-abolish-the-farm-service-agency-county-committees/> [<https://perma.cc/NK74-LATW>].

the favored few.”<sup>62</sup> It then explained that the “wide-ranging and relatively autonomous local delivery structure”<sup>63</sup> was at least part of the explanation for the injustice because local, elected committees “tend to be influenced by the values of their local communities . . . rather than by standard policies promulgated at the national level.”<sup>64</sup> The more widespread democratic accountability is at the national level, the more likely there will be just treatment as compared to the narrow democratic accountability at the local level. Again, it demonstrates that whatever “democratic accountability” means, it must be more than simple electoral politics.

#### IV. SIMPLE SOLUTIONS

The prior section demonstrates that directly electing federal administrators may be an intuitive strategy for achieving some form of democratic accountability because elections draw on majoritarian principles. However, the prior section also shows that direct administrative elections are unconstitutional and may not lead to good governance. This section will offer a proposal for altering the existing electoral structure of the farmer committees so that it comports with the Court’s appointment and removal doctrine. These changes would resolve the constitutional problems and might help overcome some of the deeply rooted practical flaws of the committee system. But most importantly, these tweaks—leading to constitutional validity and practical improvements—are a step *away* from a purely majoritarian view of democratic accountability. The move away from pure majoritarianism will help demonstrate a more complex and useful way of thinking about democratic accountability that includes individualism, reason giving, and deliberation.

The two constitutional flaws of the current system for electing farmer-administrators are easy to solve. The first flaw is that the appointment process is unconstitutional because direct election of “Officers of the United States” violates the Appointments Clause. Congress could solve this problem by giving the Secretary of the USDA authority to appoint members of the committees. This appointment could take several forms, but two approaches stand out, one for its simplicity and the other for its consistency with the current electoral structure.

The first option is simply to give the Secretary full appointment authority. The Appointments Clause allows “Heads of Departments” such as the Secretary to appoint “inferior Officers” so long as Congress grants that power.<sup>65</sup> The committees are inferior officers because, as noted in the previous section, they have the power of officers, but they report up through the USDA hierarchy rather than reporting directly to the President.<sup>66</sup> Because the farmer committees are inferior

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62. CIVIL RIGHTS ACTION TEAM, *supra* note 60, at 7.

63. *Id.* at 14.

64. *Id.* at 18.

65. U.S. CONST. art. II, § 2, cl. 2.

66. *Edmond v. U.S.*, 520 U.S. 651, 663 (1997).

officers, the Constitution allows the Secretary of the USDA to appoint them as long as Congress provides for such appointment. Congress could strike 16 U.S.C. § 590h(b)(5)(B)(ii)(I)(bb), which provides for the committee elections, and replace it with new text simply reading “are appointed by the Secretary.”

The second option for fixing the flaws in the electoral appointment process is, at least in a constitutional sense, no different from the first. Congress could give the Secretary the power to appoint committees. However, Congress could establish a secretarial appointment process that follows elections. That is, Congress could still provide for farmers to elect their peers, but rather than using these elections for direct appointment, the election could generate a slate of nominees from which the Secretary could select individuals for formal appointments. This would mimic the appointment process for some USDA commodity committees, as noted at the beginning of Section III.<sup>67</sup> In this case, Congress could amend 16 U.S.C. § 590h(b)(5)(B)(ii)(I)(bb) by adding the words “are appointed by the Secretary who shall select members” to the beginning of (bb) so that it reads: “*are appointed by the Secretary who shall select members* elected by the agricultural producers that participate or cooperate in programs administered within the area under the jurisdiction of the county, area, or local committee.” This arrangement would draw on the existing electoral structure but transfer the official appointment to the Secretary, thereby complying with the Appointments Clause.

Recall that only the electorate can “fire” committee members.<sup>68</sup> The Court has consistently held that the President must have some removal authority, even if that authority is limited or attenuated.<sup>69</sup> Thus, there must be somebody within the administration who can remove committee members. That task cannot rest solely with the electorate. Congress could solve this problem either by clearly articulating that the Secretary or a delegate can remove members of the committees or by extending the USDA’s rulemaking authority to clearly include the power to make rules about the removal of committee members. Congress might add (cc) to 16 U.S.C. § 590h(b)(5)(B)(ii)(I) and include the following provision: “are removable by the President, Secretary, or a designate of the Secretary.” In the alternative, Congress could clarify that the USDA has authority to make rules relating to removal by amending 16 U.S.C. § 590h(b)(5)(E) and adding the word “removal,” so that the provision reads, in part: “The Secretary shall issue such regulations as the Secretary considers necessary relating to the selection, *removal*, and exercise of the functions of the respective committees . . . .” These approaches would directly provide for removal within the Presidential “chain of command” or would make explicit that the USDA has authority to make rules for removal, and

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67. See 7 C.F.R. § 905.23(a); *supra* note 31 and accompanying text.

68. Granted, committee members are subject to term limits.

69. See, e.g., *Myers v. United States*, 272 U.S. 52, 163–64 (1926); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935); *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

such rules could likewise specify removal power within the bureaucracy rather than only from voters.

## V. CONCLUSIONS

The solutions I propose in this paper are not complicated. But they do complicate our thinking about democratic accountability in the administrative state. Simply put, the only way to make the farmer committees constitutional is to weaken the connection between these administrators and their voters and to situate them more firmly in the administrative state. The same administrative state that is subject to so much criticism for lacking democratic accountability.

As an initial matter, the lesson from this case study is that defining democratic accountability as coterminous with majoritarianism is wrong. Eliminating or at least cabining this view of democratic accountability can make the interpretive challenge somewhat less challenging. But I want to further argue that instead of seeing the constitutional push away from majoritarianism as a problem, perhaps when the Constitution forces administrators *into* the bureaucracy and *away from* a direct connection with voters it is, counterintuitively, increasing democratic accountability by housing administrators within a system that has many more, and more nuanced, opportunities for democratic practice than do elections alone. I have written about this elsewhere,<sup>70</sup> and have a much fuller exploration forthcoming,<sup>71</sup> so I will not belabor the point here but will make a few brief observations about administrative democracy.

The administrative state presents a series of structures for democratic accountability. In brief, the administrative state does feature majoritarian facets, alongside individualist structures, and demands for reasoning and deliberation.

Saying that democratic accountability and majoritarianism<sup>72</sup> are not synonymous does not mean that majoritarianism is not important. Majoritarianism is a critical part of any useful democratic institution because it creates inspiration for action on the front end and creates feedback and liability for action on the back end. Of course, the administrative state has multiple sources of majoritarian input. While direct elections are rare (and flawed), Congress, which voters directly elect, of course, creates the statutory authority for agency action. The President, whom voters indirectly elect, oversees agency action with extensive appointment and removal power, executive orders, budget proposals, gatekeeping by the Office of Management and Budget, and many other “backchannel” mechanisms.

70. *Death of Administrative Democracy*, *supra* note 22, at 56–61; Joshua Ulan Galperin, *Legitimacy, Legality, Legacy, and the Life of Democracy*, 45 VT. L. REV. 561, 570 (2021).

71. Joshua Ulan Galperin, *A Restatement of Democracy*, 69 VILL. L. REV. (forthcoming, 2023).

72. Or some specific implementation of majoritarianism, like direct elections or pure presidentialism.

Individualism is also essential to democracy because it recognizes an essential role for people who are not in the political majority. Individualism signals that democracy is not about solving every conflict, but about providing a system in which conflict exists yet is tolerable and sometimes productive.<sup>73</sup> It is also a core aspect of the classical liberalism at the core of our democratic system. Therefore, we protect individuals with various personal rights mostly without regard for majority preference. These rights apply equally in the administrative state, but the administrative state does more than merely protect individuals. It creates affirmative tools for individual contestation. These tools of individual contestation do not depend on an individual being part of a political majority, and they are not tied to personal rights. For instance, administrative governance provides the opportunity to petition agencies for action,<sup>74</sup> to submit comments,<sup>75</sup> and, although it is not unique to the administrative state, the opportunity to challenge agency action in an Article III court.<sup>76</sup>

While majoritarianism and individualism are aspects of useful democracy because they capture political will and allow people to act on that will, reason-giving is a facet of democratic institutions because it is part of political will formation. Reason-giving requires a decisionmaker to explain or justify their decisions. It requires decisionmakers to clarify their goals and the tactics they will use to achieve those goals. People can only effectively engage in majoritarian or individual facets of democracy if they understand what decisionmakers are doing and why they are doing it. Reason-giving is one of the hallmarks of the administrative state. Whether in adjudications or rulemakings, agencies must explain their decisions,<sup>77</sup> and this explanation frequently travels all the way to the courthouse.

Deliberation marks the final facet of an accountable democratic institution. Deliberation means that decisionmakers must be thoughtful about their choices, considering options and weighing alternatives, not merely jumping to conclusions. It is not enough that an agency act in a way that everybody agrees is smart, or that an agency explain how it intends to act. The law requires that agencies think through their actions and explain their thinking clearly.<sup>78</sup>

This multifaceted view of democracy draws on the principle that accountability comes from distributing power rather than consolidating it.<sup>79</sup> However, unlike other descriptions of the “separation of powers,” the division here is not among individuals or institutions, but among *modes of decision making*. This description treats democracy, and the administrative state, as a process for decision making

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73. Walters, *supra* note 12, at 43–45.

74. 5 U.S.C. §§ 553(e), 555(e).

75. 5 U.S.C. § 553(c).

76. 5 U.S.C. §§ 702, 704.

77. 5 U.S.C. §§ 553(c), 554(b), 557(c).

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

79. See, e.g., Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 69 (2022).

rather than a process for conflict resolution.<sup>80</sup> By incorporating majoritarianism, individualism, reason-giving, and deliberation, institutions may achieve the most democratic accountability because they create the most opportunities for engagement in the decision-making process. This is not a simple interpretation of democratic accountability, but we should be careful not to let the allure of simple answers distract us from grappling effectively with complicated problems.

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80. See Walters, *supra* note 12, at 13 (“We should no longer insist that some feature of the extant administrative state renders the decisions it makes congruent with the preferences or values of an identifiable *demos* that will accept and support those decisions.”).