

## The Effects of Partisan Polarization on the Bureaucracy

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What does the new reality of partisan polarization imply for the modern American administrative state? We might assume, quite a lot. Agencies derive their mandate and funding from an increasingly polarized Congress. They sit within an executive branch headed by a partisan politician. They receive input from (what many scholars see as) an increasingly polarized electorate. And agencies are the central characters in one of the major disputes that is driving the parties apart: namely, question of the proper role of government in private and economic life. Recent debates over the Affordable Care Act, financial regulation, antitrust regulation, greenhouse gas regulation, and net neutrality, for example, all implicate this “market versus regulation” fault line, one that has increasingly riven the American polity since the Reagan administration first began to challenge the New Deal consensus.

Scholars have had quite a bit to say about how ideological polarization affects governance, particularly our understandings of Congress (Krehbiel, 1998, Cox and McCubbins, 2005, McCarty, Poole, and Rosenthal, 2006), the parties (Aldrich, 2011), and federalism (Shor, Berry, and McCarty, 2010, Bulman-Pozen, 2014, Gerken, 2014, Metzger, 2015a). This essay reviews a less well-developed literature addressing how polarization affects administrative agencies, and suggests opportunities for new scholarly inquiries that might help us fill in our understanding of the effects of polarization on the bureaucracy. If the modern administrative state is a post-World War II institution, one that has confronted increased partisan polarization only during the last 25 years or so, it follows that the scholarship examining that relationship is necessarily in its infancy. Nonetheless, scholars are beginning to ask interesting questions about the influence of political polarization on agency decision making. Even if this scholarship has not yet generated consensus conclusions about the effects on the bureaucracy of increasingly polarized parties, we can make a few observations about its lessons so far.

The first is that the early evidence suggests that agencies are neither as paralyzed nor as prone to ideologically extreme positions as are their political overseers, even if they sometimes have more ideological room to operate than they once did. Scholars have not yet teased out why this is, though the literature suggests a number of structural explanations. The second observation is that polarization (particularly, congressional gridlock) nevertheless places increasing strain on agencies and courts, as the former face new problems within their jurisdiction without (or with less frequent and helpful) input from Congress, and the latter struggle to review those agency decisions. These struggles have important implications for the place of administrative agencies in the American constitutional design. The final observation is that as of this writing, scholarship has not yet caught up with the Trump administration's right-populist efforts to delegitimize the agency policymaking and the administrative process. It remains to be seen how successful and durable those efforts will be, and how scholars will respond to them. This essay elaborates on each of these observations.

It is important at the outset, however, to note that the task here – tracing the effects of partisan polarization on administrative agencies – implicates age-old debates about the political control of agencies by politicians, and the extent to which agencies can (or should) evade political control. The academic literatures within which those debates are waged have long been fragmented, both substantively and methodologically. Within political science, these questions are taken up by scholars who occupy a variety of subfields, including bureaucratic politics, public administration, Congress, and the presidency. Each frames the problem from the perspective of a different institutional actor, and brings different methodological norms and preferences to the task. Among legal scholars, these questions fall mostly within administrative law scholarship, but administrative law scholars borrow selectively from social scientific analyses, all the while addressing the normative dimensions of this question more directly (and transparently) than most social scientists do.

All of which makes this literature a rich and interesting polyglot, one the constant subtext of which is a tension between two competing visions. One vision is of an executive branch guided by technical expertise and “neutral competence” (e.g., Wilson, 1887, Gulick, 1937, Kaufman, 1967). The other vision is one in which interest-group rent-seeking predominates (e.g., Niskanen, 1971, Stigler, 1971). Scholars wrestle with this tension descriptively and analytically, seeking to discern the extent to which politics affects administrative decision making, and when and whether neutral competence is possible. And they wrestle with this tension normatively as well, either by premising their analyses on the desirability of either political control or neutral competence at the outset, or by engaging the normative question more directly. Thus, Woodrow Wilson's vision of a scientific administration free from politics was a normative one, just as principal-agent models of bureaucratic politics posit the accountability of agencies to their elected principals as normatively desirable or constitutionally necessary.

Of course, these views are archetypes. Today nearly all scholars accept that the “execution of law cannot be meaningfully separated from politics [and that] administration itself is inherently a political action” (Balla, 2012). It is neither the purely technical, apolitical enterprise of Wilson’s dreams, nor the purely cynical political exercise in rent-seeking described by public choice scholarship. Administration is instead a much more interesting amalgam of both political and technocratic problem solving: a process of implementing statutory goals, established by politicians, through the delegation of decision power to expert agencies. Those statutory goals necessarily reflect some combination of public and private interests, just as some combination of career technocrats and politically appointed overseers will drive the agency policy choices that implement those statutory goals. Problematically for scholars, however, the extent to which agency decisions reflect private versus public interests (or the priorities of careerists versus political overseers) varies by issue and decision, and depends upon a long list of variables, including (a) the extent to which the decision is salient to Congress or the president (whether each understands and prioritizes the issue), (b) the breadth of the statutory delegation to the agency, (c) whether the agency is an independent commission or an executive agency, and more.

Despite the heterogeneity of both agency decision environments and scholarly approaches to the study of agencies, it is probably safe to say that most scholars of the bureaucracy are interested in understanding the product of agency decision making (policy choices), and the larger implications of agency policymaking discretion.<sup>1</sup> Accordingly, we can reframe our central question this way: what has recent scholarship had to say about how political polarization affects agency *policymaking*? The focus here will be on political science and legal scholarship, and I divide that literature into two overlapping parts: (a) what legal scholars and political scientists have had to say about how polarization influences the ability of politicians – Congress and the president – to steer agency choices, both directly and indirectly; and (b) what scholars have had to say recently about the larger implications of polarization for administration, including the role of courts as the guardians of the constitutional design in a polarized world. This last question necessarily engages (and raises the stakes for) long-standing debates about the normative desirability of agency policymaking discretion. Nor could these debates be more topical: Donald Trump appointed several agency heads who are hostile to the missions of the agencies and departments they will oversee – Rick Perry (Energy), Andrew Puzder (Labor), Scott Pruitt (EPA), and Tom Price (HHS) – and nominated to

<sup>1</sup> There is scholarship addressing the effects of politics and polarization on agency behavior that falls outside the boundaries of policy choice, such as ministerial decisions, the work of what bureaucratic politics scholars once called “street level bureaucrats” (Lipsky, 1980) and what Anne Joseph O’Connell more recently described as “bureaucracy at the boundary” (O’Connell, 2014a). This review is confined to an examination of the influence of polarization on agencies as policymakers.

the Supreme Court a judge (Neil Gorsuch) who opposes the delegation of policymaking discretion to administrative agencies.

#### POLARIZATION, AGENCIES, AND POLITICAL CONTROL

If politics does indeed play some role in administration, we might reasonably infer that ideological polarization and hyper-partisanship influences agency policy choices through any of several possible pathways. One potential avenue of influence is through the actions of elected politicians, who may wish to steer agencies toward the policy choices that they (or favored constituents) prefer. If elected politicians are moving toward the ideological poles, are agencies growing more ideologically extreme as well, either through congressional and presidential oversight or by filling agencies with more ideologically extreme actors? Recognizing that relatively hierarchical agencies face fewer collective action problems when making decisions, does polarization nevertheless paralyze agencies in ways that are analogous to congressional gridlock?

What about the general public? If voters are becoming more ideologically polarized, might they push agency decisions toward the extremes as well, either directly or in partnership with elected politicians? Alternatively, might polarization drive increased opposition to agency policy choices? That is, if the distribution of voters on a single left-right dimension is becoming increasingly bipolar, and the poles are moving farther apart (as in Congress), any agency policy choice (including a choice located at the ideological median) appears to be farther and farther away to increasing numbers of voters. Might this increase the ferocity of opposition to agency policy choices?

The answers to these questions may depend, in part, upon the effectiveness of political control, and how agencies respond to the pull and tug of Congress, the president, and the public. The scholarly literature on political control is well-established and contentious, and its seminal works mostly predate the acceleration of political polarization in Congress and the electorate over the last 25 years. Thus, more recent work of the influence of polarization on agencies can be seen as extensions of these earlier debates.

#### The Political Control Debate

In the 1960s and 1970s, principal-agent models of political control drawn from economics challenged earlier models of apolitical, scientific administration.<sup>2</sup> These principal-agent models characterized bureaucrats as rational, self-interested actors whose faithfulness to their legislative mandate could be neither assumed nor trusted. Agencies could be expected to use their relative expertise

<sup>2</sup> Another challenge came from the behavioral critique of scientific administration, from sociology and psychology (e.g., Simon, 1946, Lindblom, 1959).

and informational advantages to shirk their duty to comply with statutory mandates, or with the wishes of their political overseers; alternatively, they might be "captured" by regulated interests (Niskanen, 1971, Stigler, 1971, Peltzman, 1976). This skeptical view of the possibility of political control, in turn, spawned parallel reactions in the 1980s: theories of congressional and presidential dominance, which teased out more fully the tools of political control available to Congress and the president, respectively.

The congressional dominance thesis emphasized a suite of *ex ante* and *ex post* controls available to Congress to steer administrative agency policy choices in Congress's preferred direction. These controls include the myriad ways Congress can structure agency decision processes by: (a) defining the agency's statutory mission, thereby attracting to the agency people who are dedicated to that mission, and defining the agency's choice set, (b) choosing strategically both the breadth and the executive branch recipient of the statutory delegation, so as to best advance the interests of the winning legislative coalition, and (c) empowering third parties to monitor agency decision making on Congress's behalf by alerting Congress to agency shirking behavior and participating in agency decisions, (so-called police patrols and fire alarms) (Weingast and Moran, 1983, McCubbins and Schwartz, 1984, McCubbins, Noll, and Weingast, 1987, 1989).

Congressional dominance scholars offered the Clean Air Act as an illustrative example. When Congress passed the Clean Air Act of 1970, it granted the Environmental Protection Agency (EPA) fairly broad discretion to determine which pollutants to regulate and how stringently to regulate them, subject to statutory standards that pushed the agency to focus on protection of public health. The EPA thereafter attracted a wide range of environmental professionals dedicated to the improvement of air quality. The 1970 law also included a fire alarm in the form of its citizen suit provision, which empowered environmental groups to enforce the laws requirements directly against polluters when government regulators chose not to do so. These and other fire alarms led Democratic congresses to amend the statute, first in 1977 to plug a regulatory gap for pollution in cleaner air areas, and again in 1990 to force a reluctant EPA (under Republican control) to regulate toxic air pollution more stringently. This, said proponents of the congressional dominance hypothesis, was just the sort of iterative process by which Congress could influence the behavior of administrative agencies.

The presidential control hypothesis, advanced most prominently by Terry Moe, emphasized the president's more flexible and omnipresent tools of influence over agencies, which emanate from the constitutional responsibility to supervise the executive branch within which agencies sit. These tools include the appointment power, the power to review agency rulemakings, the power to influence the public agenda, and a variety of less formal tools of influence over administrative agencies. Presidents face none of the collective action problems inherent in legislative decision making, nor are they handicapped by changing

membership every 2 years, making them the more effective influencer of agencies, say proponents of this view (Moe, 1987). Of course, presidents cannot be everywhere at once, nor can they prioritize all of the myriad policy choices made by the executive branch; but, say proponents of the presidential dominance hypothesis, the president can exercise more day-to-day influence over agency policy choices than Congress.

Certainly, Congress can try to weaken the tools of presidential control, most notably by delegating power directly to agencies (rather than to the president), fashioning agencies as independent commissions (limiting the president's removal power and mandating a bipartisan plural executive), and using the power to approve political appointments strategically. Nevertheless, say proponents of presidential dominance, the president's influence is far more flexibly dispensed and informal, and therefore more effective, even with nominally independent agencies. For example, in 1971, President Nixon was able to persuade even the chairman of the Federal Reserve, an institution designed to be apolitical and independent, to take actions that he staunchly opposed (abandonment of the gold standard, and support for a wage and price freeze) (Irwin, 2013). Nor is this an isolated anecdote; the power of the president to influence agencies by informal means finds support elsewhere as well (Cole, 1942, Verkuil, 1980).

These competing congressional and presidential control hypotheses spawned a large cross-disciplinary literature within political science, economics, and legal scholarship. That scholarship challenged and refined each of the two control hypotheses in a variety of ways. Some positive political theorists used formal models to explore in greater detail the logic of delegation (e.g., Epstein and O'Halloran, 1994, Lupia and McCubbins, 1994, Huber and Shipan, 2002, Carpenter, 2004). Other analyses attempted to measure the influence of congressional and presidential controls on agency decisions, reaching conflicting conclusions about their efficacy, depending on the circumstances (e.g., Calvert, Moran, and Weingast, 1987, Wood and Waterman, 1991, Brehm and Gates, 1995, Riquist, 1995, Balla, 1998, Spence, 1999, Whittington and Carpenter, 2003, MacDonald, 2010). Still others sought to model formally the ways in which agencies could resist political control by playing Congress and the president off against one another (e.g., Hammond and Knott, 1996).

Both formal and empirical models in this literature struggled at times to capture the importance of expertise in the delegation process, particularly the influence of expertise on preference formation. That is, Congress may leave particular policy questions unanswered in enabling legislation because it foresaw the issue at the time of enactment but (a) believed the expert agency was better equipped to address the issue well or (b) could not muster majority support for any particular policy response. Alternatively, Congress might not have foreseen the issue at all, even though the issue is clearly within the class of problems the resolution of which was delegated to the agency by the statute – a circumstance likely to apply to an increasing number of agency policy choices

as statutes grow older, unchanged, in the age of congressional gridlock. While a few of the formal models of delegation attempt to model future uncertainty (e.g., Bawn, 1995), most have difficulty capturing all of the reasons why broad delegation might be rational, and likely to yield policy choices that Congress (or the median voter) would have made if it could overcome the information asymmetries and collective action problems that afflict that body. Some of the scholarship responding to the congressional dominance hypothesis raised this point, and questioned whether “Congress” has preferences apart from those expressed in legislation (Shepsle, 1992), and if so, whether they should guide agency decisions (Farber and Frickey, 1992).

For their part, legal scholars tended to focus on the interaction of these various tools of control, and on the normative implications of political control for agency policymaking. Some of this work accepted the strategic assumptions of the congressional and presidential dominance hypotheses (that is, the normative preferability of political control) and sought to refine the dominance hypotheses (Eskridge, 1994, Eskridge and Ferejohn, 1992, 2001, Macey, 1992a, 1992b). Others noted ways in which agencies could retain autonomy nevertheless (Mashaw, 1990, 1997, Spence, 1997), or aimed to nudge thinking about the bureaucracy back toward Wilsonian progressivism (Robinson, 1991, Rose-Ackerman, 1992). Still others articulated a much stronger normative and constitutional case for presidential control, one that challenges some accepted notions of Congress’s power to structure or circumscribe the president’s supervisory control over executive branch entities (e.g., Yoo, Calabresi, and Colangelo, 2005). This idea, known in legal scholarship as the theory of a “unitary executive,” has been embraced by the Trump era GOP as a means of reining in the so-called deep state.<sup>3</sup>

In the end, this debate yielded no consensus but seemed to confirm that because Congress and the president have informational and resource disadvantages vis-à-vis the bureaucracy, Congress, and the president can exercise influence only selectively. But when they can devote their attention to that task, they can each be effective shapers of agency policymaking.

### **Polarization Via Direct Political Control?**

So how does partisan polarization affect these dynamics? We know, of course, that polarized parties in Congress have become more ideologically homogenous, and have grown farther apart ideologically (McCarty, 2004, McCarty, Poole, and Rosenthal, 2006). Scholars ascribe this to a variety of factors, most of which fall within either of two categories: one focusing on the increasing ideological homogeneity in congressional districts (Stonecash, Brewer, and

<sup>3</sup> President Trump’s lawyer, John Dowd, cited unitary executive theory by name in a confidential memo to Special Counsel Robert Mueller on June 23, 2017, arguing that the constitutional grant of executive power to the president empowers him to fire the special counsel at will (Dowd, 2017).

Mariani, 2003, Carson et al, 2007, Bishop, 2008), and a second focusing on various kinds of institutional factors that affect how parties manage congressional business (Layman, Carsey, and Horowitz, 2006, Pildes, 2011). And scholars have observed that whatever its cause, polarization in Congress begets gridlock (Krehbiel, 1998, Cox and McCubbins, 2005, Binder, 2003), weakening Congress's ability to use legislation to exert political control over agencies.

Throughout most of the history of the modern administrative state Congress has been able to legislate – to fine-tune agencies' enabling statutes – in response to changing circumstances. Indeed, that is exactly what happened in the Clean Air Act example discussed above. But partisan gridlock reduces Congress's ability to steer the agency – to alter the agency's statutory authority when Congress dislikes the agency's policy choices, or when the initial definition of the agency's authority becomes ill-suited to new or changing circumstances. The Dodd-Frank Act, the only major legislation updating an existing regulatory regime during the Obama era, seems the exception that proves the rule, and (given the Trump administration's desire to repeal or weaken it) may well be an illustration of Maltzman and Shipan's (2008) conclusion that laws passed by particularly ideologically diverse coalitions tend to be less durable than those enacted by unified coalitions. Now, more often than not, when voters who are dissatisfied with an agency policy choice try to set off the appropriate fire alarms, there is no response. More accurately, the gridlock interval (defined at its boundaries by the ideal points<sup>+</sup> of the president and Congress) is wider than it once was, so any fire alarm sounded in response to an agency policy choice within that wider interval will fall on deaf ears.

It follows that if Congress cannot mount a credible threat to intervene legislatively to alter the agency decision environment, there is more opportunity for agencies to pursue their own ends, and/or for presidential control of agency choices, at least within the policy discretion afforded by the original delegation.<sup>4</sup> If presidential control is effective, we should expect to see agency decisions moving closer to presidential policy preferences and away from

<sup>+</sup> I use here the jargon of spatial modeling, which permeates discussions of partisan polarization. An actor's "ideal point" describes the location of her preferred policy on a single (e.g., left-right) ideological or issue dimension, under specified conditions. The term "gridlock interval" describes the set of policies or policy choices along an issue dimension for which Congress (or Congress and the president, depending upon the model) cannot manage to overturn through legislative action. For a fuller explanation of spatial models of gridlock, see Binder (2003).

<sup>4</sup> Fahrang and Yaver (2015) conclude that during periods of divided government, Congress seeks to impede presidential control by fragmenting its delegations of power among multiple executive branch actors, thereby increasing the transaction costs associated with presidential control efforts. Selin (2015) finds that Congress was able to insulate the Federal Trade Commission (FTC) from presidential influence by imposing statutory limits on appointments and other tools of influence over time. Presumably, since Congress must overcome gridlock in order to legislate in the first place, it finds the creation of these limits on the president increasingly difficult to impose.



congressional preferences during this era of polarization. There is some anecdotal evidence suggesting as much. Certainly the opposition parties have complained loudly about unilateralism during the (George W.) Bush and Obama administrations, and President Obama indicated his preference for "going it alone" in the absence of congressional action in a number of policy areas. A recent analysis of "executive unilateralism" found that presidents are more likely to issue executive orders when Congress is gridlocked (Bolton and Thrower, 2015). The early days of the Trump administration saw flurry of executive orders; and the George W. Bush administration seems to have put a particular premium on centralization and ideological loyalty, using signing statements and executive orders, and centralizing review of agency decisions in the White House more effectively than previous administrations had (Moynihan and Roberts, 2010).

Some argue that we can infer increasing presidential influence over agency policymaking from abrupt changes in agency policy direction and enforcement behavior associated with changes in partisan control of the White House. William Kovacic suggests as much from the observation that antitrust enforcement priorities and practices vary greatly between Democrat and Republican administrations, as the Obama and (Bill) Clinton administrations opposed more mergers and brought many more enforcement actions than the (George W.) Bush administration did. This back and forth, says Kovacic, is problematic because it reduces the effectiveness of antitrust law and injures the "brand" of the antitrust enforcement agencies (Kovacic, 2014). This phenomenon seems evident as well in environmental law. As partisan control of the White House shifted from the mid-1990s through the Obama years, the EPA reversed course at each transition on a wide variety of policy decisions relating to air pollution and water pollution, generating a mountain of costly litigation and policy uncertainty. The Obama administration's Clean Power Plan represents the culmination of this process, criticized as overreach by the majority party in each legislative chamber; yet Congress remains unable or unwilling to overrule the program legislatively. And Daniel Ho (2010) found some evidence of increasing politicization within the FCC, associated with the appointment of a strong agency chair willing to use his agenda-setting power to push agency decisions toward the president's preferences. Based on President Trump's executive branch nominees, we might expect a similar sharp change in policy direction for several executive branch agencies in the Trump administration.

Can we infer from these examples that presidents now dominate Congress in the quest to exert control or influence over agencies? Most of the empirical evidence focuses on single-agency examples, which may or may not be representative of the broader universe of agencies. Nevertheless, when an agency's (or a president's) ideal point on an issue is at or near the edges of a gridlock interval widened by partisan polarization in Congress, then it follows logically that the agency (or the president) can pursue a more extreme position than s/he might otherwise have been able to pursue. Yaver's (2015) empirical analysis of

EPA behavior finds that the agency has had more latitude to pursue its own policy preferences in the era of divided government and polarized parties, demonstrating that agency latitude can be widened by polarization.<sup>5</sup> Among the four presidents who sat atop the modern administrative state in the era that combined mostly divided government and polarized parties, at least two (George H.W. Bush and Bill Clinton) tended to hold relatively centrist policy preferences, and so we might not expect to see their appointees pushing policy toward the boundaries of the gridlock interval. Agency policy choices are further disciplined by the requirement that those choices remain within the boundaries of enabling legislation. Review of agency rules by the White House Office of Information and Regulatory Affairs, which acts as a filter in the rulemaking process, can also push agency decisions away from the extremes. Those centripetal forces may have limited (so far) the opportunities for agency extremism. For example, Freeman and Spence (2014) examination EPA's implementation of the Clean Power Plan and the Federal Energy Regulatory Commission's (FERC) regulation of electricity markets acknowledges the additional latitude afforded agencies in the absence of Congress's involvement in new policy choices, but concludes that both EPA and FERC nevertheless made their choices carefully and iteratively in ways that were sensitive to their political overseers (and the courts), and mostly tempered their bolder instincts.

Importantly, while analyses focusing on contested agency policymaking are illuminating, we do not yet have multiagency empirical studies examining the ideological variance of agency policy choices as a function of ideological polarization in Congress. That kind of quantitative empirical study across agencies poses particularly difficult problems, given the heterogeneity of agency decision-making processes (rulemaking, adjudication, or other informal process), agency cultures (norms of neutral competence vs. politicization), agency jurisdiction (single- vs. multi-industry), and agency structures (independent commissions vs. executive agencies). We might expect more independence from *ex post* congressional control, and from presidential control, among agencies structured as independent commissions, agencies with cultures favoring independence, or with multi-industry jurisdictions, for example. Anecdotally, we see some of this dynamic playing out in the early rounds of the Trump administration's efforts to deregulate (and thereby resurrect) the coal industry. While the Trump appointees who dominate the FERC have resisted the administration's efforts to intervene in energy markets to benefit coal-fired power plants, the EPA administrator has been a much more effective instrument of regulatory

<sup>5</sup> Yaver and many other scholars use the language of "bureaucratic drift" to describe situations like this. I avoid that term, in part because it uses Congress's preferences as the anchor from which agency preferences drift; however, it seems more likely that it is Congress's preferences will move more quickly and sharply over time. Congress changes composition every 2 years; agencies preferences seem more likely to be anchored to their (increasingly fixed) statutory missions. Thus, the term "bureaucratic drift" seems misleading.

change, initiating the process of repealing numerous rules and regulations aimed at coal mining and coal combustion in the first few years of the Trump era. However, cross-agency studies focusing on these variables could help us identify any broader trend in the ideological movement of agency policy choices.

Still, if we cannot (yet) detect more systematic movement of agency policy choices toward the extremes, perhaps we can nevertheless detect increasing ideological polarization in the preferences of the individuals that populate agencies. In recent years scholars have developed new and better ways to infer the preferences of bureaucrats, methods that are more granular than merely noting the party of the appointing president. Indeed, some of these methods permit us to infer agency ideal points by bootstrapping from Congressional ideal points, making direct comparisons with members of Congress possible.<sup>6</sup> Interestingly, scholars using these data have mostly concluded that even in the era of gridlock, Congress has the ability to resist the president's attempt to use the appointment power to move agencies toward his policy preferences.

This may be due in part to the Senate's confirmation power, and its ability to simply delay or refuse to approve the president's nominees. The evidence suggests that confirmation delays and executive branch vacancies have grown more common in the era of polarization. (Devins and Lewis, 2008). More to the point, some scholars exploring the ideological implications of this dance between the Senate and the president on political appointments have found that as the ideological distance between the president and Congress grows, presidents are *less* able to secure like-minded appointees (McCarty, 2004, Bertelli and Grose, 2011), and fewer appointees are confirmed (Lewis, 2008). Moreover, we know that Congress engages in more executive branch oversight during periods of divided government (Kriner and Schwartz, 2008); and some research indicates that enhanced oversight can influence agency decisions (MacDonald, 2010, Fong and Krehbiel, 2018). Therefore, if polarization widens the ideological divide between Congress and the president during periods of divided government, perhaps the incentive to engage in adversarial oversight grows as well, further slowing or preventing the agency's movement toward the president's ideal point.<sup>7</sup>

Thus, despite its relative inability to legislate, Congress apparently retains some leverage over agencies, and uses that leverage in ways that may impede movement toward the president's preferences when government is divided. But

<sup>6</sup> Clinton and Lewis (2008) used surveys of bureaucrats on legislative issues to compare their ideal points to those of members of Congress. Other scholars look at the behavior of political appointees, such as campaign contributions to members of Congress, to infer the locations of their ideal points (Bertelli, 2011).

<sup>7</sup> Indeed, MacDonald and McGrath (2016) have found that the incentive to engage in *ex post* oversight of agency decisions made by administrations of the opposing party continues during unified government.

the news is not all bad for presidents. Krause and O'Connell (2015) find that presidents place an increasing premium on ideological loyalty in *making* appointments over time, and that this loyalty premium often comes at the expense of the appointee's institutional competence. Hollibaugh and Rothenberg (2018) find that presidents are strategic about appointments, considering both the ideology of the appointee and the independence of the position to which the appointee is nominated in making appointments. Thus, to the extent that these appointees survive Senate confirmation, they ought to move agencies toward the president's preferences. And when the preferences of the president and Congress are relatively closer to one another, presidents may be better able to use the power of appointment to move agencies toward their preferred policies (Devins and Lewis, 2008, Ho, 2010). Consistent with these observations, several Trump administration cabinet officials survived the confirmation process only to be criticized sharply on competency grounds. In sum, though, the extant literature supports the intuition that agency appointees tend to have ideal points that lie somewhere between Congress and the president, and that agency policymaking remains within that ideological space.

Finally, it is worth noting that these kinds of analyses (of political influence over agencies) have difficulty operationalizing the relative influence of careerists versus political appointees over agency policy choices. It is not clear in which direction careerists would push an agency choice. Some proponents of presidential control contend that careerists and their adherence to the norms of their "issue networks" frustrate the president's wishes (Hecklo, 1978, Rosenbloom, 2011), but that is not quite the same thing as saying that careerists push policy choices toward the extremes. To the contrary, moderate agency policy choices may appear to be the product of a tug of war between Congress and the president, but those choices may also be pushed toward the center, or toward the agency's view of its statutory mission, by influential careerists within the agency who are dedicated to that mission. Susan Dudley (2012) contends that administration in the era of congressional polarization is more *contested* than it used to be, but not more *polarized* ("hyperventilating, not "hyperpartisan"), in part because of the influence of careerists over agency policymaking. This sort of effect may be particularly difficult to detect in quantitative analyses because the agency decision output and structural variables are visible but the intra-agency process opaque.

In sum, the nascent literature evaluating direct political controls on the modern administrative state in the era of partisan polarization does not suggest that ideological extremism in Congress and the presidency is pushing agency policy choices toward the ideological poles, at least not yet. It may be that regardless of their policy preferences agencies are cautious, and do not wish to attract the adversarial attention of Congress or the president, which keeps their policy choices between the ideal points of those two overseers. Or it may be because agency choices are constrained by statutory mandates created during a period when Congress was more ideologically moderate. As Anthony Bertelli

recently noted, “the bulk of the administrative state . . . was built with moderates in the congressional party caucuses,” during the period stretching from the New Deal through the 1970s (Bertelli, 2011). In other words, agencies may be ideologically moderate because of *ex ante* political controls embedded in their missions by the enacting Congress. The Trump administration’s promise of sharp break with the past may represent a departure from this tradition. A populist president may see value in disruption, in pushing agency policy-making beyond statutory boundaries or the congressional gridlock interval. If so, it will be up to courts and Congress to react. If courts discipline agency extremism, will the Republican Congress and president amend agency enabling legislation to authorize the new agency policy? Time will tell.

### Voter Polarization and Indirect Political Control

Looking beyond Congress’s and the president’s attempts to influence administrative agencies directly, we might ask what effect the polarization of the *electorate* has on agency decisions? Part of the congressional dominance hypothesis specifies that Congress mobilizes the general public to keep agencies in their respective jurisdictional lanes, and to guard against regulatory capture. Fahrang (2008) found that Congress is more likely to empower citizens to use litigation to control agencies when Congress’s preferences diverge from those of the president, consistent with the notion that ideological distance stimulates interbranch contests to influence delegated agency decisions. Proponents of congressional dominance also cite the Administrative Procedures Act of 1946 (APA), which guaranteed the public rights to participate in the administrative process, as an example indirect congressional control.

Might participation in agency proceedings by an increasingly polarized public push agencies toward the extremes? To date there has relatively little scholarship addressing the effects of polarization on agency decisions via this particular pathway. That may be due in part to disagreement among scholars about the degree of polarization in the electorate. Indeed, polarization in Congress need not imply polarization in the electorate (McCarty, Poole, and Rosenthal, 2009, Groser and Palfrey, 2013). Some believe that the ideological polarization seen in Congress is mirrored in the electorate as a whole. (Abramowitz, 2011, Pew Research Center, 2014a). Voters are increasingly consuming their news from ideologically friendly media sources (Iyengar and Hahn, 2009), and disdaining opposing views and information that supports those views (Jamieson and Capella, 2010, Iyengar and Westwood, 2015). However, other scholars believe that polarization along the general electorate is overstated, and that there remains a large group of relatively apolitical voters with either centrist or ideologically ill-defined views; rather, we see more polarization among political and partisan elites than among average voters (Fiorina and Abrams, 2008, Pew Research Center, 2014b).

Levendusky (2009) attempts to reconcile these competing views by distinguishing ideological movement over time from partisan sorting, whereby voters observing ideological polarization among elites are motivated to switch parties in order to eliminate a perceived inconsistency between their ideological identification and their party identification. Other scholars argue that a focus on a single left-right dimension overstates polarization, and that partisans hold much more heterogeneous views when we examine individual issue dimensions (Crespin and Rohde, 2010). This suggests that representatives may be able to build majority coalitions across party lines on individual issues (Hillygus and Shields, 2009, Farina, 2015). If so, and agencies are aware of this potential, it may offer yet another explanation for the lack of movement to the ideological poles in agency decision making over time. Additionally, as agency decision making takes place within these individual issue dimensions, if preferences are less spread and/or single-peaked, that may offer another reason why agency decisions have not moved away from the center.

Still, even if average voters have not become more partisan or more ideologically extreme, it may be that partisan elites have. We might hypothesize, then, that if agencies respond more to direct pressure than to their sense of the median voter's opinion, elite polarization ought to make the agency's decision process more contentious (if ideologues at both poles participate). Politically active voters may bolster the participation of pressure groups in agency rulemakings or may exert pressure on elected representatives with influence over agency decisions (the president, state, and local government actors that may have influence on particular agency decisions, or congress via no legislative means). If these partisans are farther from the ideological middle than they once were, a moderate agency policy choice (one near the center of the ideological spectrum) will appear more extreme to them from their positions on the periphery. Consequently, in a polarized environment agencies might expect to receive more comment on proposed rules, and for those comments to be stronger and more negative in tone.

Anecdotal evidence seems to support this hypothesis. The Congressional Research Service speculates that the size of the Federal Register has grown in recent decades, even though the number of rules (and the number of major and economically significant rules) issued by the executive branch has not, because agencies must respond to a larger number of comments (Carey, 2016). For example, recent rulemakings by the Department of Labor on worker overtime and EPA's greenhouse gas regulations generated enormous numbers of comments (250,000 and 4.3 million, respectively). The 400-plus rulemakings through which several agencies continue to implement the various mandates of the Dodd-Frank Act have been slow, and especially contentious.

We might also expect that ideological polarization among interested parties – the perception that an agency decision is extreme because it is farther away from my ideal point – will trigger more legal challenges to final agency rules, all else equal. Moreover, if political polarization is asymmetric between the

parties and centered in large part around divide over the role of government, then this increasing antipathy to the administrative state might be expected to generate more opposition (comment and/or litigation) to the decisions made by regulatory agencies, even if those agencies sit near the center of the great ideological divide. Any systematic empirical test of these intuitions will have to overcome difficult specification problems, given the number of important contextual variables that can drive participation in agency proceedings or the decision to litigate.

While participation in agency policymaking is open to citizens across the ideological spectrum, agencies could be moved toward one extreme if that (extreme) view is overrepresented in the agency decision process. Indeed, agency capture posits just such a dynamic. In its insidious form, capture involves the intentional, conscious subversion of the agency's public interest mission through the collusion of bureaucrats, the regulated industry (and Congress or congressional committees). In its innocuous form, agency policy choices move toward the industry's ideal point because the agency is consistently exposed to more information from the industry than from other participants; assuming that industry has the most accurate information about its own business and operations, this version of capture can sometimes be difficult to distinguish from mere informed agency policymaking. The logic of capture has captivated economists, but its insidious version enjoys relatively little support among legal scholars and political scientists (Spence and Cross, 2000, Carpenter and Moss, 2013). Nonetheless, if polarization in the electorate begets more extreme positions among those interest groups that dominate the agency decision process, then this dynamic could push agency policy choices away from the center.

There is another aspect of the relationship between agencies and a polarized citizenry that might be worthy of more scholarly attention: namely, how the rise of populism, as distinguished from small- or anti-government conservatism, influences the work of agencies. The 2016 presidential election cycle put populism on display, in both major parties. The success of the Donald Trump candidacy drove a wedge between populist Trump supporters, on the one hand, and traditional small-government conservatives, on the other, offering some ammunition to Hetherington and Weiler's (2009) thesis ascribing partisan differences in the electorate to citizens' worldview and personality, especially voters' authoritarianism. We might speculate that Republican voters have become more tribal and less *ideological* (as opposed to ideologically homogeneous) as the Trump administration pursues protectionism and other market interventions that are inconsistent with traditional conservatism. If so, a populist executive may perceive more leeway to pursue agency policies that deviate from voters' ideological preferences. Alternatively, the Trump GOP may be a coalition of convenience between ideological conservatives and populists alienated from government elites of all ideological stripes – in which case decisions may be a product of intra-coalition bargaining or competition. Future work

might examine the presence and effects of these alternative decision rules in agency policymaking. Regardless, whatever divide once existed within the GOP between populists and ideologues seems to have been either papered over or healed, as congressional Republicans have mostly supported the administration's nominees and early initiatives in the common pursuit of a mostly anti-regulatory agenda.

This dynamic seems also to be feeding skepticism toward expertise and experts; it has already spawned news coverage about the "age of distrust" in elites and experts, and of "post-truth politics" (Cohen, 2016). It follows that since agencies are populated with experts and policy "elites," this sort of populism may reduce public trust in agency policymaking, increasing popular opposition to agency decisions, as expressed through comment on rulemakings, litigation, or (perhaps) increasing noncompliance with agency regulations. The rise in right-wing populism is a relatively recent phenomenon, and we do not yet have systematic empirical analyses tying it to agency policy choices. However, we can look to tracking polls for evidence of changes in public trust in agencies. The Pew Research Center asked respondents about their trust in government agencies in 2013 and 2015. It found that despite eroding trust in "government," people continue to hold positive views of most federal agencies (with the exception of the IRS), though Republicans show lower levels of trust than Democrats, and Tea Party Republicans a lower level of trust than other Republicans (Pew Research Center, 2013, 2015). A University of Texas tracking poll on energy issues shows consistently high levels of trust in the "academic/scientific community" across a range of energy issues, but less trust in government regulators, depending on the issue (University of Texas, 2016).

These poll data seem inconsistent with the idea that trust in experts or government agencies is declining precipitously. However, while the number of people who distrust experts or agencies may not be growing, it may nevertheless be that polarization and populism are leading those who distrust to distrust more intensely. Certainly, ideological polarization and populism may exacerbate psychological and cultural biases that lead voters to cling to false beliefs and discount the credibility of experts, something that experimental research has already demonstrated among individuals (e.g., Kahan and Braman, 2006, Nyhan, 2010). Over time, this dynamic could erode trust in regulatory agencies, particularly agencies that are charged with regulating significant risks, such as the Nuclear Regulatory Commission (Slovic et al, 2000). And if populist presidents may be willing to push agencies to pursue policies that please constituents but conflict with enabling legislation, that dynamic may (all else equal) push agency decisions toward extremes.

In sum, scholars have not reached any firm conclusions about how direct participation in agency policymaking by a (potentially) more polarized or alienated electorate is influencing the content of agency policy choices. This may be simply because disentangling the relative influence of public comment from the agency's awareness of congressional and presidential



preferences, limits imposed by enabling legislation, and the agency's own policy preferences is a difficult task.

#### POLARIZATION, JUDICIAL REVIEW, AND CONSTITUTIONAL DESIGN

As a federal appeals court judge once observed, "as night follows day, litigation follows rulemaking" in American regulation (*NWF v. Lujan*, 1991); indeed, judicial review of agency policy choices is the norm. For as long as the administrative state has existed, administrative law scholars have spilled considerable amounts of ink describing, analyzing, and evaluating the judicial review of agency decisions, producing particularly extensive literatures on the question of how, when and why courts defer (and ought to defer) to agency decisions. Since 1946 much of that discussion has been organized around the requirements of the APA, which sought to legitimate agency policymaking by imposing public participation and transparency requirements on that process, and articulating standards by which courts ought to review agency decisions.

Because judicial review of agency decisions often focuses on whether the agency's decision is consistent with its underlying statutory authority, in the era of congressional gridlock that inquiry often involves the application of an old statute to the agency's resolution of a new problem: one that may not have been foreseen by the enacting Congress, but is nevertheless the type of problem that seems to fall within the agency's statutory remit. The courts have devised a series of tests to guide their review of agency decisions in these cases, but the constitutional legitimacy of agency policymaking is always an important subtext to these reviews. Indeed, most judicial review of agency policymaking is colored by the court's assumptions about the proper place of agency policymaking in our constitutional design, as are most scholarly explorations of this same question.

For most scholars, the touchstone of legitimacy in this context is *accountability*: the policy choices of unelected agency decision makers must be "accountable" to the public in some way. Beyond this widely accepted generalization, however, there is disagreement about what accountability means in practice, and how it is, or should be, manifested. Scholars working within administrative law and public administration tend to engage this normative question a little more directly than scholars working within the bureaucratic politics tradition, but almost all undergird their analyses with some sort of normative choice about this issue.

Proponents of congressional control of the bureaucracy suggest that the legitimacy of agency policymaking depends in large part on the ability of Congress to steer agency decisions in some sort of ongoing way, framing the political control problem like this:

A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens. . . . Because elected officials

have limited resources for monitoring [agency decisions], the possibility arises that the bureaucrats will not comply with their policy preferences. (McCubbins, Noll, and Weingast, 1987)

It remains commonplace for social scientists to premise studies of agency behavior on “the responsiveness of government agencies to elected officials” (Selin, 2015). This view is prominent in administrative law scholarship as well, through the influential work of Peter Strauss, who proposed a model of agency legitimation based upon accountability to the political branches. Looking to the Constitution, Strauss referred to Congress, the president, and the judiciary as the “apex institutions” to which agencies *must* be accountable in order for agency policy making to be constitutionally legitimate (Strauss, 1984).

The centrality of accountability to scholarly conceptions of the legitimacy of the administrative state is not surprising. There is no article of the Constitution exclusively devoted to detailing the powers of administrative agencies, the way Articles I through III do for Congress, the president, and the courts. Agencies *are* delegates, whose mandate is specified by legislation, and whose actions are overseen by the president and the courts. However, to frame the relationship between elected politicians and agencies as an *ongoing* principal-agent problem for *both* political principals is too simple. It substitutes a reductivist assumption for a complex, nuanced idea – accountability – and in so doing sidesteps decades of prior scholarship that explores that complexity and nuance.<sup>8</sup> Instead, it might be more productive to explore more closely the various ways in which an agency may be accountable to Congress, the president, and the public.

### Legitimacy and Accountability to Congress

One way for an agency to be accountable to Congress is to ensure that its decisions are consistent with the goals of the *enacting* Congress, as articulated in the agency’s statutory mandate. Scholars of all stripes agree that the legitimacy of agency action depends upon this kind of accountability to Congress. The more interesting accountability question is the one courts face when reviewing (increasing frequent) agency decisions that are not clearly addressed by that mandate? Should those decisions be guided by the wishes of the *current* Congress? Do agencies owe fealty to the current Congress’s preferences, even

<sup>8</sup> That literature dates back at least to the 1940s, when public administration scholars Herman Finer and Carl Friedrich engaged in (what was then) a famous debate about the normative desirability of agency policymaking discretion. Finer foreshadowed later principal-agent models when he argued that intervention by elected officials is necessary to hold agencies accountable, because the electoral connection implies that elected officials have a better understanding of the public good than bureaucrats ever could (Finer, 1941). Carl Friedrich, however, saw accountability differently, arguing that bureaucrats’ technical expertise and professional norms meant that they make better decisions that served the public better than those made by relatively uninformed, elected politicians (Friedrich, 1940).

if those preferences are not expressed through the passage of legislation or other official actions?

Some scholars would impose on agencies a kind of ongoing fiduciary duty not to stray too far from the wishes of the current Congress, and would ask courts to be less deferential to agency decisions when the current Congress is gridlocked. They argue that congressional responsiveness to police patrols and fire alarms is essential for the legitimacy of agency policymaking. Thus, agencies have a legitimacy problem when gridlock makes it more difficult for Congress to muster legislative majorities to amend agency enabling legislation or cut agency budgets. Scholars premise this idea on Congress's "constitutional responsibility for regulatory oversight" (Farina, 2015), or on a more general notion of legislative supremacy within the constitutional design (Greve and Parish, 2015).

But so what if gridlock *does* impair Congress's ability to intervene? Does it necessarily follow that courts should be less deferential to agencies acting under broad delegations in that case, or that Congress's diminished ability to act poses a constitutional problem for agency policymaking? Legal scholars have begun to devote serious attention to the problem of statutory obsolescence. Several recent papers have worried openly about the mismatch between administrative law in practice and the theory of administrative law, one partly driven by congressional gridlock (Farber and O'Connell, 2014, Sohoni, 2016). Allison Orr Larsen (2015) explores the question of whether statutes can be "unconstitutionally stale," a question she answers mostly in the negative. By contrast, William Eskridge's and John Ferejohn's (2010) idea of "superstatutes" – major, robust, thoroughly deliberated laws addressing important problems through broad delegations to regulators – suggests that courts ought to interpret superstatutes (if not necessarily other statutes) dynamically and flexibly over time.

Other scholars seem less comfortable with agency policymaking that strays from the wishes of the current Congress. Yaver (2015) frames her empirical study of EPA's adherence to the wishes of the current Congress as a compliance problem for Congress, one that goes to the heart of the legitimacy of agency policymaking. Huber and McCarty (2004) describe agency policymaking discretion as a potential usurpation of the politicians' constitutional role, one that is ultimately incompatible with democracy. Legal scholars Michael Greve and Ashley Parish sound similar alarms, in ways that echo earlier administrative law debates over the nondelegation doctrine. They liken judicial deference to agencies to "an ancient royal prerogative . . . [and] . . . a collection of black and grey holes, where executive power goes unchecked by formal and effective legal constraints," and argue that ultimately "the will of Congress must prevail" (Greve and Parish, 2015).

Several recent Supreme Court opinions have signaled some of this same discomfort with agencies' use of old statutory authority to address important or significant new problems, and suggest that courts should look especially

skeptically on agency attempts to address these sorts of “major questions” without new congressional guidance. The major questions rule seems premised, at least in part, on the notion that “Congress is Congress,” not merely a succession of (115 and counting) Congresses. Therefore, when asked to review an agency policy choice, courts are presented with two questions: the question of whether the choice was consistent with the wishes of the enacting Congress (expressed in enabling legislation), *and* the question of whether the decision is the kind of decision that ought to be made by the current Congress.

However, it is not self-evident that the legitimacy of agency policymaking depends at all on agency fealty to the will of the current Congress, gridlocked or not. Indeed, what *is* the will of a gridlocked Congress? One could argue that if Congress cannot muster the majority necessary to act, it has no (legally recognizable) will at all. The courts’ first task in judicial review of agency action is to hold the agency to its statutory mission, and the will of the enacting Congress that created that mission; the current Congress is an entirely different overseer, one whose authority over the agency is a function of its actions, not its informal or potential opinions. When courts choose to shift decisions about how to implement old statutes to the current (gridlocked) Congress, they merely restore the status quo ante; doing so is no more “democratic” than leaving those decisions with the agency, at least until Congress affirmatively chooses to speak (again) through legislative action. To the contrary, one might argue that by delegating policymaking power to the agency the enacting Congress designated the agency as the statute’s custodian, and the agency’s claim is arguably the democratically superior one (Freeman and Spence, 2014). Callander and Krehbiel’s (2014) recent formal model of delegation arguably supports the notion that courts ought to respect broad delegations to agencies, by demonstrating that such delegations help Congress overcome gridlock and produce decisions that the legislature could not make but for the delegation. Public administration scholar Charles Goodsell (2012) argues that in the face of congressional gridlock bureaucrats should be “stewards of the institutional well-being of the country’s administrative assets,” which implies a duty not merely “to keep things running smoothly, but also to grapple with the large policy decisions that surround the appropriate allocation of public resources.”

One rejoinder to this view is the notion that gridlock is constitutionally preferred, and that the policymaking process was “designed for gridlock” (Burns, 1963). This view fits nicely the Trump GOP’s suspicion of the executive branch, and can be used to challenge the legitimacy of exercises of delegated power that involve issues the enacting Congress did not specifically foresee. This view, which may emanate from the lofty position held by Federalist No. 10 in American civics education, might then imply that the use of delegation to overcome gridlock ought to be unconstitutional. However, as many scholars have noted, this view oversimplifies the Framers’ intent (Binder, 2003, Gerhardt, 2013). Certainly the Framers wanted a government that works; indeed, they explicitly rejected the kinds of supermajoritarian decision rules

that have become the norm in the Senate, and which feed congressional gridlock today (Madison, Federalist No. 58, Hamilton, Federalist No. 22). This ought to be unsurprising given the historical context: the Framers sought to replace a paralyzed and dysfunctional government under the Articles of Confederation with one that could deliberate in order to produce reasoned policy decisions.

In sum, while there is no disagreement about the agency's obligation to remain faithful to the enacting Congress's through its enabling legislation, neither is there agreement among scholars or the courts about whether agency policy choices must be faithful to the wishes of the current Congress, or whether the current Congress's diminished capacity to intervene implies that courts should be more, or less, deferential to agency policy choices.

### **Accountability and Other Pathways to Legitimacy**

Courts troubled by the inability of a gridlocked Congress to exercise ongoing influence over agency policy choices can, if they so choose, seek agency policy-making accountability and/or legitimacy elsewhere, by recognizing: (a) the direct public participation component of most agency policy choices; (b) the power and constitutional basis of presidential oversight; and (c) the argument that agency policymaking more closely resembles the kind of deliberative process envisioned by the original constitutional design than does modern congressional policymaking.

As noted above, in an era of ideological polarization we can expect public participation in the agency policymaking process to be more contentious. Courts reviewing agency action hold the agency to the procedural requirements of the APA, which requires agencies to respond to public comments when engaging in rulemaking, to respect the procedural rights of those individuals who are the object of agency adjudications, to create a record of their decisions, and to follow other APA transparency requirements. These procedural requirements were originally designed to legitimate agency action by mimicking legislative and adjudicative processes endorsed by Articles I and III of the Constitution, respectively. However, some scholars see this idea as a disappearing fiction, and openly lament the disconnect between the APA model of agency decision making and agency decision making in practice (e.g., Farber and O'Connell, 2014). On the other hand, these departures from the APA ideal can also be seen as useful adaptations (e.g., Sohoni, 2016). Gluck, O'Connell, and Po (2015) agree that most policymaking nowadays is accomplished using less transparent, more centralized processes – what they call “unorthodox” lawmaking and rulemaking; however, in their view some of this unorthodoxy helps overcome polarization-induced gridlock. In any case, the APA's procedural requirements, coupled with the other procedural and transparency requirements Congress includes within enabling legislation, collectively provide a public record of agency action according to which courts can review agency

decisions. We take this record, and the participation rights it affords, for granted; but it is of no small importance, and is at least a part of how agency policy choices remain accountable to the public.

Proponents of presidential dominance argue that it is presidential oversight that legitimates agency policymaking because it is effective, and because it is constitutionally mandated. Once the initial delegation of authority has been made, presidents seem to have the greater opportunity to influence agencies, particularly executive agencies, and particularly during times of congressional gridlock. Agencies remain subject to the influence of an elected president, even if they are not necessarily continuously influenced by the president. Moreover, proponents of presidential dominance argue that in a time of partisan polarization, that influence is more likely to reflect broad national interests, rather than the narrower interests of a legislative coalition. Indeed, they say, for most of its history Congress has been an ineffective policymaker, one responsive to parochial forces, while presidents represent the national interest because they are elected by a national constituency (Howell and Moe, 2016). Furthermore, when the president exercises supervisory power over administrative agencies, s/he is exercising a constitutional power.<sup>9</sup>

Significantly, Article II not only vests the executive power in the president, it also explicitly authorizes the president to appoint “public ministers and counsels [and] other officers” and to require the heads of executive departments to report to the president on the execution of their duties. And it envisions that when Congress creates additional offices the president will fill those offices with his appointees (Art. II, Sec. 2). It is entirely logical and foreseeable that the executive branch would grow in this way over time, and that delegation of authority would be a necessary and inevitable part of that growth. These Article II admonitions are the rules by which the modern administrative state was built, and they imply a constitutional authority for its construction and operation under presidential oversight (Strauss, 1984, Metzger, 2015b, 2015c). Thus, courts worried about the effects of partisan polarization and congressional gridlock on oversight of the administrative state may instead conclude that presidential oversight can provide agencies with sufficient legitimacy to satisfy the constitutional minima.

Finally, courts worried about deferring to agency policymaking discretion may consider yet another possible argument in favor of its constitutional legitimacy: that modern agency policymaking reflects the kind of deliberative policymaking the Framers sought to encourage. Madison’s goal for government resembled that of his contemporary Edmund Burke: that government should decide as the people would decide *if* the people could devote the resources and time necessary to understand the problem. The Madisonian theory government

<sup>9</sup> One may wonder whether these conclusions hold up in the face of growing partisan loyalty and reduced salience of ideology in the Trump GOP. Tribal attachment to the leader may give him leeway to pursue less centrist and more extreme positions without risking loss of support.

was (and is) about structuring the delegation of decision authority to a government that will deliberate carefully, and will choose a policy that reflects “the permanent an aggregate interests of the community” (Madison, Federalist No. 52). According to this view, Madison and Hamilton were less interested in congressional dominance, and more interested in designing a system of “institutions [that] would have some level of collective accountability to the people as a whole” (Pope, 2011). The Framers expected much of this careful deliberation to occur in the Senate, insulated as it was from the pressures of factions by the indirect selection of its members (that is, selection by state legislatures). But, as other scholars have noted, the Seventeenth Amendment made the Senate a much less deliberative body. This is a particular problem in today’s polarized American polity, where the meaning of the “permanent interests of the community” is particularly hotly contested. Thirty years ago John Rohr (1986) made a persuasive argument that administrative agencies now serve the deliberative function that the Framers envisioned for the Senate. Rohr’s argument, that agencies may do a better job of producing policy decisions that correspond to the Burkean ideal of representation, seems more persuasive in light of today’s gridlocked, polarized Congress. More recently, Anthony Bertelli (2011) has suggested that polarization has upset the original constitutional design, one that was based on the interaction of deliberation and a strong electoral connection, and that “institutions must adapt to create legitimacy.” Might judicial deference to broad delegations of policymaking authority to agencies be one such useful adaptation? Perhaps.

But that deference, however defensible, seems increasingly unlikely in the Trump era. To the contrary, the notion of deference to agency expertise is under attack from the right. Social scientists have not had much to say yet about judicial review of agency action in the Trump era, or about what Gillian Metzger has called a growing “anti-administrativism” among conservative jurists and legal scholars. In particular, Metzger sees a growing sentiment to weaken or undo important precedents calling on courts to defer to agency judgments (Metzger, 2017). Her observation seems accurate, and is partly the product of an economic (public choice) challenge to the very idea that an “aggregate” or “community” interest exists. Despite its success, the normative case for anti-administrativism is not particularly strong. As noted above, delegation is efficient for Congress and the president, and consistent with the constitutional design. Even in an era of partisan polarization, agencies remain accountable to the enacting Congress directly through judicial review. Furthermore, they are directly accountable to the public through the operation of the APA and other procedural controls, and to the president through presidential oversight. Congressional gridlock implies a kind of reduced “accountability” to the current Congress, but as explained above there is (at the very least) room for debate about whether the loss of that kind of accountability poses a legitimacy problem for agencies in the first place. When ongoing gridlock forces agencies to address new problems using old statutory authority, recent

scholarship implies that deference to agencies acting under general or broad delegations can overcome gridlock.

## CONCLUSION

This essay reviews the ways in which scholars are beginning to tackle the question of how increased partisan polarization affects the modern administrative state. These early scholarly efforts suggest that despite a polarized Congress and (somewhat less clearly or sharply) polarized electorate, agency policy choices do not seem to be moving systematically toward the extremes. Some combination of moderating effects seem to be at work here, including the effect of divided government on appointments, agency preferences driven by moderate statutory mandates and/or the norms of issue networks, and (at times) the influence of ideologically moderate presidents on the size of the gridlock interval. Anecdotally, the Trump administration may represent a departure from these norms; it may be that conservatives in the Trump coalition are freer to pursue policies disfavored by a majority because of the non-ideological nature of populist loyalty to administration policy initiatives. But scholars have not yet been able to confirm or deny whether that is generally true. Regardless, polarization-induced congressional gridlock poses ongoing challenges for the administrative state. Agencies continue to address problems within their regulatory jurisdiction in the absence of input from Congress, using statutes that may have been poorly designed to handle the new problem. And courts reviewing those agency decisions will continue to struggle, case by case, with the implications that sort of agency policymaking for the constitutional legitimacy of agency policymaking.

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