

# The Legislative Politics of Legislative Delegation

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CSAS Working Paper 19-03

*Congress and the Administrative State: Delegation, Nondelegation, and Un-Delegation*, February 22, 2019.

“The Legislative Politics of Legislative Delegation” Joseph  
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Congress has been in the business of delegating its powers widely to administrative agencies for over a century, and yet it is a constitutional issue that will not go away. In spite of an abysmal record at the Supreme Court over the past few decades, nondelegation challenges still occupy the Court’s docket on a routine basis.<sup>1</sup> The legal arguments and precedents for and against legislative delegation of power are widely known and understood, but it is less well-known that political scientists have been studying delegation for decades and have reached conclusions that deepen our understanding of the politics and interests at play when Congress chooses to give power to the bureaucracy. Rather than focusing on accountability and legality, these studies draw our attention to the institutional structures and incentives that loosen or constrain delegation.

In much of the literature, delegation is treated as a simple phenomenon in which Congress abdicates power for two reasons: a deficiency in its expertise and capacity to solve a complex problem, and a political incentive to receive credit for accomplishing vague goals while transferring responsibility for costs to an unelected bureaucracy. Treating delegation in such simple terms paints only a partial picture of the politics of delegation. Scholars have

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<sup>1</sup> In his administrative law textbook, Gary Lawson explains that nondelegation challenges between *Mistretta v. U.S.* in 1989 and *Whitman v. American Trucking* in 2001 lost by a total of 53-0 votes at the Supreme Court. See Lawson, *Federal Administrative Law*, 7<sup>th</sup> ed. (West, 2016), 160.

been insufficiently attentive to the political context in which delegation occurs, a subject that some political scientists have studied at length. Understanding their insights helps to fill in the rest of the picture.

A great deal of literature in political science, broadly defined under the rubric of “Positive Political Theory” (PPT), attempts to provide theoretical models to illustrate the institutional forces that give rise to greater or lesser delegations of power to the administrative state. Their insights are the subject of the first two sections of this article. To summarize briefly, they argue a) that Congress delegates broadly and to politically accountable officers in conditions of united government but narrowly and to officers insulated from presidential control under divided government, b) that Congress uses structure and procedure to ensure that administrative policies favor their preferred constituencies and interests, both immediately and in the long run, c) that the extent of congressional delegation will be heavily influenced by its calculation of the transaction costs associated with crafting specific legislation, and d) that the power of committees and other legislative checkpoints both strengthens delegation and influences the kinds of bargains that are reflected in statutes.

Taking these insights into consideration should lead scholars to a fuller understanding of the context around which delegation occurs. For those who are concerned about the decline of Congress and the breadth of its delegation to the bureaucracy – a growing chorus – attention to these factors will help to pave the way for political reforms that would reduce

the phenomenon of delegation, rather than waiting on the Court to impose limits from the bench. In other words, reforming Congress may be the best path to reforming delegation. Creating a Congress that is encouraged to retain its lawmaking power, through internal rules and structures that promote accountability, is a more effective strategy for limiting delegation than relying on judicial enforcement. Part III of this article, therefore, describes the recent evolution of Congress to show how it has placed limits on its ability to legislate effectively. The mid-20<sup>th</sup> Century Congress was designed to facilitate delegation by devolving power to its committees and subcommittees, which formed alliances with administrative agencies and interest groups that favored greater delegation to the administrative state. Since the middle of the 1970s, some powers have shifted back to party leaders, but these leaders lack the tools necessary for building and maintaining coalitions that reclaim a legislative agenda. Therefore, today's Congress is ill-suited for legislation, neither trusting its specialized committees for knowledge nor its party leaders for coalition building. Reversing these developments by instituting rules that encourage accountability should be a priority for those who seek to restrain the growth of delegation.

## I. Delegation and Agency Structure and Procedure

### A. The Abdication Hypothesis

Until relatively recently, political scientists explained Congress's delegation of power to the bureaucracy with an "abdication hypothesis." Congress's delegation of its core legislative power raises an obvious question: why would members of Congress willingly

divest themselves of power? The Constitution's framers predicted the opposite problem, namely that officials would seek to usurp the powers of the other branches. Congress's willingness to do so seems to contradict James Madison's famous prediction in Federalist 51 that "ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." This problem, Madison predicted, would be most acute in the legislative branch, which "necessarily predominates" in a republican form of government.<sup>2</sup> At the time the Constitution was ratified, legislative usurpations were the primary threat to disrupt the separation of powers, provoking one of Madison's most famous images in *The Federalist*: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>3</sup> Yet delegation suggests a Congress abdicating its authority rather than clinging to it and grasping at more. Rather than caring about the constitutional rights of their office, members seemed happy to reduce their power and expand the influence of the bureaucracy.

To explain this puzzling phenomenon, the abdication hypothesis posited that members of Congress care more about re-election than about maintaining control of policymaking authority. Members, therefore, are relatively indifferent to the policy choices made by administrative agencies.<sup>4</sup> The chief goal of members is reelection, and delegation

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<sup>2</sup> James Madison, *The Federalist*, no. 51, in Alexander Hamilton et. al., *The Federalist* (Indianapolis: Liberty Fund, 2001), 268-9.

<sup>3</sup> James Madison, *The Federalist*, no. 48, in *The Federalist*, 256-7.

<sup>4</sup> See especially D. Roderick Kiewet and Mathew McCubbins, *The Logic of Delegation* (Chicago: University of Chicago Press, 1991). Kiewet and McCubbins acknowledge the conventional wisdom that Congress loses its authority when it delegates, but they offer a provisional challenge. While they accept that Congress's ability to

allows them to maximize that goal by shifting policymaking authority to less accountable actors, rendering delegation a rational response to the prioritization of popularity over policymaking. In other words, the abdication hypothesis suggested that members actually accomplished their goals through delegation, since the goal of reelection was more important to them than the goal of expanding their own power. Again, for some years, political scientists and legal scholars emphasized this rationale for delegation, and it still prevails in many circles today.<sup>5</sup>

The difficulty with the abdication hypothesis is that it does not fully explain both congressional and agency behavior. Members of Congress consistently seek to exert influence over the bureaucracy, and agency behavior is frequently responsive to the wishes of members. Congress's delegation of lawmaking authority does not mean a Congress indifferent to the policy choices made by agencies. Political scientists have argued that members of Congress do not abandon control and influence over policymaking when they delegate power to the bureaucracy. Through the structure and procedures they create for bureaucracy, they constrain what appear on the surface to be open-ended delegations of policymaking authority to agencies. Understanding these congressional techniques yields a

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monitor and control the behavior of agencies is limited, they also chronicle ways in which Congress can extend greater control over the bureaucracy.

<sup>5</sup> See, e.g., Morris P. Fiorina, *Congress: Keystone of the Washington Establishment*, 2d ed. (New Haven: Yale University Press, 1989); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993).

fuller understanding of the nature of congressional delegation and how it affects administrative policy.

### B. Agency Structure: Divided Government and Administrative Insulation

One of the most critical variables that affect the extent of legislative delegation is the most obvious political factor: partisan sympathy or antipathy between the legislature and the president. As a consequence of the Supreme Court's ruling in *Humphrey's Executor* and subsequent cases, Congress is able to insulate regulatory bodies from the President's oversight through removal of administrative officers.<sup>6</sup> Presidential control of the bureaucracy poses a threat to congressional influence, and it also threatens to disrupt the policy preferences of the coalition that enacts an organic statute. Therefore, when the President's policy priorities or preferences conflict with those of Congress, Congress will structure agency authority to insulate it from presidential control. Conversely, when Congress and the President are politically aligned, Congress will transfer authority to its political ally in the executive branch.

Work by David E. Lewis and others have shown that divided government plays a central role in the way that Congress designs agencies and grants them authority.<sup>7</sup> Lewis's work focuses on the president's interests and goals during the creation of new administrative agencies. Presidents, he explains, are primarily concerned with preserving and expanding

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<sup>6</sup> Cite *Humphrey's* and *Morrison*.

<sup>7</sup> David E. Lewis, *Presidents and the Politics of Agency Design* (Palo Alto, CA: Stanford University Press, 2003).

their control over the bureaucracy, while “Members of Congress care less holistically about the design of the administrative state. They are more attuned to the short-term parochial interests that are key to their reelection.”<sup>8</sup> Divided government, however, increases the incentives for members to insulate power from presidents, and so Lewis notes that “Members fundamentally seek to limit the president when the president is likely to exert influence over the agency in a way inconsistent with their preferences either now or in the future.”<sup>9</sup> Not surprisingly, the evidence shows that “insulated agencies are more likely to produce policies closer to the legislative median’s ideal point than other agencies.”<sup>10</sup> But Lewis, unlike other scholars in the PPT field, emphasizes the power that presidents have to influence Congress’s choices regarding the design of agencies. Stronger presidents actually influence Congress, on the whole, to give them greater control over the agencies that Congress creates.<sup>12</sup>

Nevertheless, Congress’s ability to delegate power to agencies that are not accountable to the President has enabled it, as critics of Humphrey’s Executor have long complained, to diminish the President’s ability to manage and direct the increasingly-expansive administrative state. As Lewis has argued elsewhere, the most durable and persistent agencies are those which Congress as most successfully insulated from presidential control. Thus, over time, the presidency becomes increasingly incapable of directing the regulatory

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<sup>8</sup> Lewis, *Politics of Agency Design*, 16.

<sup>9</sup> Lewis, *Politics of Agency Design*, 16. See also 39-69.

<sup>10</sup> Lewis, “The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies,” *British Journal of Political Science* 34 (2004):

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<sup>12</sup> Lewis, *Politics of Agency Design*, 107-136.

state.<sup>13</sup> This means that Congress gains influence and control as it structures power in independent agencies rather than agencies that are accountable to the President. Lewis's work lends empirical support to the idea that "insulated agencies are more responsive to congressional direction than other agencies."<sup>14</sup>

This work on divided government and agency design highlights a fundamental threat to the separation of powers, one which seems not to have been appreciated by the Framers: attachment to political parties. The presupposition of the separation of powers is that officers' personal motives will attach to their offices. But party attachment can weaken the personal motives to resist encroachments of other branches, and can encourage inter-branch collaboration. These motives undermine the motives that preserve the separation of powers.<sup>14</sup> United government produces a Congress more willing to cede power to other branches, and divided government increases the incentives for Congress to maintain control over its constitutional authority.

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<sup>13</sup> Lewis, "Adverse Consequences of the Politics of Agency Design," *British Journal of Political Science* 34 (2004): 377-404.

<sup>14</sup> Lewis, "Adverse Consequences," 400. For one example, see Sarah Binder and Mark Spindel, *The Myth of Independence: How Congress Governs the Federal Reserve* (Princeton, NJ: Princeton University Press, 2017).

<sup>14</sup> See Daryl J. Levinson and Richard H. Pildes, *Separation of Powers: Not Parties*, 119 *Harvard Law Review* 2311 (2006).

### C. Administrative Procedure: Stacking the Deck

The work described in the previous section explores the relationship between partisanship and Congress's design of agency structure. Other scholars focus on agency design as well, but are interested in how agency design affects control over the bureaucracy. Political scientists for decades have been debating whether the President or Congress (or even the courts) are most in control of the decisions of administrative agencies. Eventually, a theory of "congressional dominance" emerged, largely due to the work of "McNollgast," the pen name adopted by frequent collaborators Mathew McCubbins, Roger Noll, and Barry Weingast. McNollgast claimed that Congress gains greater control over administrative agencies by manipulating the procedural environment when it delegates power to the bureaucracy, to prevent "bureaucratic drift" from the priorities of the legislative coalition that enacted the law. Congress uses procedures, in other words, to ensure that the bureaucracy follows the wishes of the people who initially passed the legislation delegating power to the bureaucracy.

In two important articles, McNollgast laid out the essential argument that procedures should not be understood exclusively as expertise-oriented or to promote fairness. Rather, they are chief mechanisms by which Congress influences the future policy decisions of the bureaucracy.<sup>15</sup> They "enhance the ability of political principals in general to solve their

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<sup>15</sup> Mathew McCubbins, Roger Noll, and Barry Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3 (1987): 243-77; Mathew McCubbins, Roger Noll, and

agency control problems.”<sup>16</sup> In the first article, in 1987, McNollgast sought to explain the procedures contained in the Administrative Procedure Act, the National Environmental

Journal of Law and Economics 32 (1989): 35-61. There are some dissenters. See Glen Robinson, “Commentary on Administrative Arrangements and the Political Control of Agencies: Political Uses of Structure and Process,” *Virginia Law Review* 75 (1989): 483-98.

<sup>16</sup> McNollgast, “Administrative Procedures as Instruments of Political Control,” 255.

Policy Act of 1969, and the Freedom of Information and Government in the Sunshine Acts through this lens. McNollgast followed up on that article with a 1989 article in the *Virginia Law Review* applying the basic reasoning to other provisions of law.

The basic problem that members of Congress confront when creating new federal programs, McNollgast argue, is that the policy decisions and wishes of the bureaucracy are likely to differ from those of the members who enacted the program.<sup>16</sup> Presuming that members of Congress act rationally, it would follow that they would devise programs that extend their control over the bureaucracy. It is true that Congress can devise mechanisms for controlling agency behavior after the fact, through the well-known oversight and appropriations mechanisms mentioned above, but there are problems associated with relying

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Barry Weingast, “Structure and Process; Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” *Virginia Law Review* 75 (1989): 431-82. See also Thomas Gilligan, William Marshall, and Barry Weingast, “Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887,”

<sup>16</sup> This insight is widely recognized by political scientists beyond McNollgast. In fact, there is a vast literature in political science addressing the relationship between political and administrative actors as a principal agent problem. See Barry Mitnick, “The Theory of Agency: The Policy ‘Paradox’ and Regulatory Behavior,” *Public Choice* 24 (1975): 27-47; Terry Moe, “The New Economics of Organization,” *American Journal of Political Science* 28 (1984): 739-77; Barry Weingast, “The Congressional-Bureaucratic System: A Principal-Agent Perspective,” *Public Choice* 44 (1984): 147-92.

exclusively on those mechanisms. Most obviously, they only control agency decisions after they are made. In addition, legislative oversight is time-intensive and requires members to expend resources to ensure the appropriate level of control. Information asymmetries between the agencies and Congress only exacerbate these costs.<sup>17</sup>

In their ideal world, members of Congress would have “ex ante” mechanisms for controlling agency decisions to supplement the well-known, ex post mechanisms. While most of the attention to congressional control over the bureaucracy has focused on oversight through committee hearings and control over appropriations to agencies,<sup>18</sup> there are other mechanisms Congress can use to control agency behavior before the fact, rather than relying upon these types of ex post controls. Members of Congress could rely on substantive commands to agencies, in essence making the policy themselves and turning the administrative agency into a purely ministerial body, but they have an option that is easier to deploy: procedural design.

Procedures can determine who gets to participate, and therefore to influence agency behavior, and in doing so they incentivize agencies to follow the wishes of different interests and parties. Notice-and-comment rulemaking procedures, for instance, give interested parties an opportunity to influence agency decisions by submitting comments and responding

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<sup>17</sup> McNollgast, “Administrative Procedures as Instruments of Political Control,” 249-53.

<sup>18</sup> For examples, see Terry Moe, “Control and Feedback in Economic Regulation: The Case of the NLRB,” *American Political Science Review* 79 (1985): 1094-1117; R. Douglas Arnold, “Political Control of Administrative Officials,” *Journal of Law, Economics, and Organization* 3 (1987): 279-86.

to agency proposals. Administrative law doctrines that require agencies to take these comments seriously when issuing final rules increase the weight these interests exert in the administrative process. By requiring extensive notice and comment procedures in statutes, Congress can create an administrative law regime that uses procedures to influence substantive outcomes.

McNollgast argued that administrative procedures were actually reflective of highly sophisticated attempts by members of Congress to control agency behavior in a way that does not even require active monitoring or oversight by members themselves.<sup>19</sup> Administrative procedures shift power to different institutional decisionmakers, empower different actors to review and challenge agency decisions, and dictate the extent of information that must be gathered and analyzed before policies are made. As “McNollgast” has written, “procedures can be used to enfranchise important constituents in agency decisionmaking processes, thereby ensuring that agencies are responsive to their interests.”<sup>20</sup> Procedures, therefore, can be used to limit delegations that appear to be broad in substance because they limit the discretion and independence of administrative agencies.<sup>21</sup> The use of administrative procedure and structure to control administrative behavior enables members to game the

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<sup>19</sup> See note 15, *supra*.

<sup>20</sup> McNollgast, “Administrative Procedures as Instruments of Political Control,” 244.

<sup>21</sup> Mathew McCubbins, “The Legislative Design of Regulatory Procedure,” *American Journal of Political Science* 29 (1985): 721-48.

system to produce preferred policy outcomes, turning apparent abdications into clever mechanisms for making policy.

The basic purpose of these procedural and structural mechanisms is to ensure that the policies made by the bureaucracy reflect the wishes of the coalition that enacted the original legislation. The enacting coalition guards against “bureaucratic drift” by structuring administrative procedures to give the interests served by the program influence over its implementation. As McNollgast explained: “the coalition that forms to create an agency...will seek to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands....In other words, the coalition ‘stacks the deck,’ in the agency’s decisionmaking to enhance the durability of the bargain struck among members of the coalition.”<sup>22</sup> In other words, administrative procedure and structure are tools for existing legislative coalitions to shield their work from the possibility of a bureaucracy that does not share the same priorities or may be directed by interests that are hostile to those of the enacting coalition. While the legislature does not “pre-select policy outcomes” in guarding against future legislative or bureaucratic drift, the members “create a decisionmaking environment that mirrors the political circumstances that gave rise to the establishment of the policy” in the first place.<sup>23</sup>

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<sup>22</sup> McNollgast, “Administrative Procedures as Instruments of Political Control,” 255.

<sup>23</sup> McNollgast, “Structure and Process, Politics and Policy,” 444.

Some have questioned the “deck stacking” component of McNollgast’s argument. Using case studies of various agencies, they have not found significant empirical support for the proposition that administrative procedures had dramatic policy effects, or they have found that this approach is not effective in every instance.<sup>24</sup> But there is much empirical work that supports McNollgast’s theory. As Sean Gailmard summarizes, “on the whole this [empirical] literature has found that McNollgast’s arguments significantly help in explaining the contours of administrative procedure.”<sup>25</sup> And some subsequent research has explored the possibility that Congress designs administrative procedures not to guard against “bureaucratic drift,” but to prevent “coalitional drift,” in which subsequent coalitions in the legislature direct policy away from the wishes of the original, enacting coalition. As Murray Horn and Kenneth Shepsle explained in a commentary on McNollgast, “the enacting coalition must try to protect the deal it has struck at enactment from the predations of various actors – it must worry not only about the potential for bureaucratic drift...but also about the influence of subsequent political coalitions.”<sup>26</sup> One study concluded that Congress has strategically

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<sup>24</sup> See Steven J. Balla, “Administrative Procedures and Political Control of the Bureaucracy,” *American Political Science Review* 92 (1998): 663-673 (finding that the Health Care Financing Administration was more responsive to physicians than Medicare beneficiaries in spite of procedures favoring the latter); David B. Spence, “Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies,” *Journal of Legal Studies* 28 (1999): 413-459 (arguing that only some of the ex ante political tools imposed on FERC had noticeable effects on the agency’s decisions).

<sup>25</sup> Sean Gailmard, “Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, ‘Administrative Procedures as Instruments of Political Control,’” in *Oxford Handbook of Classics in Public Policy and Administration*, ed. Steven J. Balla, Martin Lodge, and Edward C. Page, [page #]

<sup>26</sup> Murray J. Horn and Kenneth A. Shepsle, “Commentary on ‘Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies’: Administrative Process and Organizational Form as Legislative Responses to Agency Costs,” *75 Virginia Law Review* 499 (1989), at 499.

manipulated policy outcomes by designing administrative agencies to increase the difficulty for future coalitions to change administrative policies. Examining 141 agencies created legislatively between 1879 and 1988, this study concluded that Congress account for “coalitional drift” by selecting “administrative designs that increase transaction costs for future coalitions attempting to alter policy.”<sup>27</sup> Other studies have lent provisional support to the “deck stacking” argument.<sup>28</sup> Although it does not account for everything that Congress does when it delegates power, most of McNollgast’s theory about Congress’s use of administrative procedure to ensure that its preferences are followed rather than those of other actors has stood the test of subsequent analysis.

## II. Delegation and the Structure of Legislative Power

The effectiveness of the “stack the deck” strategy described by McNollgast hinges on an important presupposition: that the laws which create these structures and procedures cannot be easily altered. The durability of the original arrangement is the critical feature that makes system-rigging appealing to legislators who want to entrench their preferences. As David Lewis explains: “If additional statutory specificity, independence, fixed terms for political appointees or the like can be altered easily, then they provide neither a credible

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<sup>27</sup> B. Dan Wood and John Bohte, Political Transaction Costs and the Politics of Administrative Design, 66 *Journal of Politics* 176 (2004), at 181.

<sup>28</sup> Matthew Potoski and Neal D. Woods, “Designing State Clean Air Agencies: Administrative Procedures and Bureaucratic Autonomy,” *Journal of Public Administration Research & Theory* 11 (2001): 203-222 (arguing that administrative procedures imposed on state-level air pollution control agencies have significant effects on agency autonomy and interest-group influence).

commitment against future influence nor a secure way of locking in policy. Both the view of insulation articulated by McNollgast and that argued by Moe depend fundamentally on the difficulty of passing new legislation. If new legislation can be passed, then all attempts at insulating are useless.”<sup>29</sup> A legislature which is capable of easily changing existing legislative bargains diminishes the value of each bargain. A legislature which can change law only with difficulty increases the effectiveness of enacting legislation in the first place.

This indicates the difference between delegation in American politics as opposed to delegation in other countries. As Frank Buckley as argued, parliamentary systems more effectively limit the power and discretion of their bureaucracies through oversight.<sup>30</sup> The analyses of McNollGast and Moe offer an additional reason for this difference: that the American system of separation of powers exacerbates delegation through its legislative checks and balances. Because it is more difficult for the Congress to act, it is easier for present congresses to lock in their preferences and insulate them from future policymakers.<sup>31</sup>

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<sup>29</sup> Lewis, “Adverse Consequences,” 381.

<sup>30</sup> F. H. Buckley, *The Once and Future King: The Rise of Crown Government in America* (New York: Encounter Books, 2014), 167-256.

<sup>31</sup> McNollgast did not focus much attention on the problem of legislative or coalitional drift, attending mostly to the problem of bureaucratic drift from the enacting coalition’s preferences. But others have picked up and elaborated upon the theme of legislative drift, a future coalition drifting from the preferences of the existing coalition. See especially Murray J. Horn and Kenneth A. Shepsle, *supra* note 27; Jonathan R. Macey, “Organizational Design and Political Control of Administrative Agencies,” *Journal of Law, Economics, and Organization* 8 (1992): 93-110; Kenneth A. Shepsle, “Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey,” *Journal of Law, Economics, and Organization* 8 (1992), 114-5; <sup>33</sup> Horn and Shepsle, “Administrative Process and Organizational Form,” 503.

As Murray Horn and Kenneth Shepsle wrote in response to McNollgast, “Although an enacting coalition cannot bind the actions of a subsequent coalition, it is able to influence the costs that subsequent coalitions must incur to modify a deal. The committee system in Congress, for example, enhances the durability of a deal in precisely this way. Once a deal is struck, it will often “stay stuck” precisely because politicians on the committee of jurisdiction (who were part of the original enacting coalition) are the gatekeepers for any subsequent tinkering with the deal; their effective veto power over alterations raises the cost of change, thereby enhancing the durability of the original deal.”<sup>33</sup> Strong committees, in other words, provide powerful incentives for members of Congress to use administrative procedures to protect their legislative bargains from subsequent amendment by a Congress whose members have preferences different from those of the coalition that enacted the original statute. Committees provide additional checkpoints to supplement the constitutional checkpoints in the legislative process, all of which contribute to the durability, and therefore the appeal, of striking such bargains. Giving members of Congress the ability to shield their policies from revision by future legislatures provides powerful incentives for delegating power to agencies under conditions that provide these shields.

#### A. Transaction Costs and the Congress of Collective Inaction

The structure of Congress – the configuration of its rules and procedures – will favor certain members over others. For instance, if the only path to passing a bill is to navigate the committee of jurisdiction, members of that committee have more influence over policies

subject to their jurisdiction than their colleagues. If bills that emerge from committees are brought to the floor under closed rules that limit amendments offered by non-committee members, they are further strengthened. By contrast, if party leaders can circumvent committees and send legislation to the floor, they are able to strike deals without the support of members on the relevant committees. Put differently, Congress's internal rules and procedures affect the distribution of power between rank-and-file members, committee members, committee chairs, party leaders, and other important players in the legislative process.

One implication of this insight is that Congress's rules and procedures affect its ability to legislate efficiently and maintain control of policy. In other words, Congress's propensity to delegate its powers may be the product, in part, of its ability to do its work efficiently without reliance on administrative agencies. PPT scholars have analyzed delegation through this lens, suggesting that when transaction costs in Congress are increased, delegating decisionmaking authority becomes more appealing.

David Epstein and Sharyn O'Halloran originally advanced this argument, asserting that the decision by members of Congress to delegate is based on simple transaction cost considerations. Their theory claims that delegation occurs "when the external transaction costs of doing so are less than the internal transaction costs of making policy through the normal legislative process via committees." Rather than shirking responsibility, in their view, Congress delegates for the sake of efficiency, "in a manner that minimizes the costs of

producing policy.”<sup>32</sup> More specifically, borrowing from Keith Krehbiel’s theory in *Pivotal Politics*, they argue that the median voter in the legislature decides whether to attempt to make policy through the legislative process or by delegating it to the bureaucracy.<sup>33</sup> There are costs associated with trying to make policy through the legislative process, but there are also costs associated with delegating to the bureaucracy.

In evaluating the costs on both sides, several factors will tip the balance in favor of one option or the other. Agreeing with the conventional wisdom, Epstein and O’Halloran argue that divided government makes Congress less likely to delegate, or to delegate to independent agencies. But in addition to this factor, they focus on a variety of internal congressional structures that also affect this calculation. For instance, they claim that when committees deviate from the preferences of the rest of Congress, the likelihood of delegation increases. Delegation allows members of relevant oversight and appropriations committees to exert control over administrative policies without having to go through the lawmaking process, where their preferences must be balanced against those of other members with equal voting power. Thus, strengthening the power and autonomy of congressional committees increases the likelihood that Congress will delegate lawmaking power the administrative

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<sup>32</sup> David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Approach to Policy Making Under Separate Powers* (Cambridge University Press, 1999), 43.

<sup>33</sup> Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998). Krehbiel argues that pivotal voters in the legislature, rather than political parties and bare majorities, are the key actors that overcome gridlock and produce decisions in Congress. Since these pivotal voters are the ones who determine whether a measure passes or fails, they are the ones who influence the final policy outcomes.

state.

In addition, Epstein and O'Halloran find that as party cohesion declines in Congress, more authority is delegated to the bureaucracy. Party cohesion enables Congress to overcome transaction costs by providing a method for debating and overcoming differences. They reduce the transaction costs associated with getting individual members with competing priorities and preferences to agree on a single policy. Conversely, they find that where a significant amount of information is required to make policy, Congress is likelier to delegate, due to the increased costs of enacting specific legislation. When individual members do not fully understand the decisions they are making, and cannot acquire relevant information easily, they will prefer to delegate responsibility to other actors. It would follow that reducing these informational costs would reduce the disincentives for delegation.

Epstein and O'Halloran test these propositions by examining over 250 major bills considered by Congress between 1947 and 1992, and they find that Congress is more willing to delegate when doing so reduces the costs of making policy. If members can more easily attain their policy goals by delegating power and working with the bureaucracy, than by working with their colleagues to build a legislative coalition, they will choose delegation.

If the theory is as reliable as the empirical evidence suggests, it suggests that one of the most effective methods for influencing the amount of delegation is structuring Congress in a way that tips the scale in favor of legislating. Reducing the costs of legislating, or increasing the costs of delegating, should have measurable effects for determining the extent of

delegation. Congress is an institution that acts collectively only with difficulty, yet its collective action is necessary for it to perform its core legislative function. Rules and procedures that inhibit collective action and favor individual action will exacerbate delegation, while those which necessitate and encourage collective action will diminish it.

## B. Vetogates: Incentivizing Congress to Pass the Buck

The most obvious sources of transaction costs in Congress are established by the Constitution itself. The Constitution designed Congress under the theory of “legislative balances and checks,” as Alexander Hamilton explained in *Federalist #9*.<sup>34</sup> To enact legislation, Congress has to overcome its internal division of power. Bicameralism is reinforced by distinguishing the House and the Senate as much as possible, pitting them against each other. In the canonical description of the Constitution’s checks and balances, in *Federalist #51*, Madison wrote that the remedy for legislative predominance “is, to divide the legislature into two different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”<sup>35</sup> In short, each house of Congress provides an independent checkpoint on legislative action. Congress can only act if it can get through each checkpoint.

William Eskridge describes these checkpoints as “vetogates,” and he explains that

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<sup>34</sup> Alexander Hamilton, *The Federalist*, no. 9, *supra* note [X], at 38.

<sup>35</sup> James Madison, *The Federalist*, no. 51, *supra* note [X], at 269.

Congress's rules set up even more vetogates than those created by the Constitution. Today, Congress can only legislate collectively if each house can overcome internal vetogates, such as committees with the power to kill legislation, party leaders who can keep legislation from reaching the floor of their respective chambers, and conference committees charged with reconciling differences between House and Senate bills.<sup>36</sup> These vetogates entrench the status quo and make Congress's collective action even more difficult than the framers anticipated.<sup>37</sup> Statutes that delegate power, therefore, enable Congress to make policy more easily by controlling implementation than by going through the difficult work of legislating. As Eskridge writes, "If vetogates make statutes hard to enact, they make them doubly hard to repeal. To repeal a statute, supporters must not only press their proposal through various vetogates, but they must contend with a regulatory endowment effect: most statutes create constituencies and reliance interests for their regulatory regime, and these engender extra opposition to changing or abandoning the statutory policy. Vetogates and regulatory endowment effects work together. Because these constituencies and reliance interests usually have political influence at critical veto points, such as House or Senate committees or subcommittees, they are often able to block changes even when legislative majorities would desire such changes."<sup>38</sup> The Constitution is designed to frustrate the building of majority

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<sup>36</sup> William N. Eskridge, Jr., "Vetogates, Chevron, Preemption," 83 *Notre Dame Law Review* 1441 (2008), at 1444-8.

<sup>37</sup> In other words, both the Constitution and many of the internal rules of the House and Senate diminish the likelihood that Congress will act collectively, or behave like the "collective Congress" described in Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 *New York University Law Review* 1463 (2015).

<sup>38</sup> William N. Eskridge, Jr., "Vetogates, Chevron, Preemption," *Notre Dame Law Review* 83 (2008), 1453-4.

coalitions and to ensure that lawmaking can only occur after the exertion of great effort.

This creates the potential problem of lack of government responsiveness to the wishes of the majority. Delegation exacerbates these difficulties by incentivizing members of Congress to preserve the status quo rather than engage in arduous legislative work that may prove fruitless. Once a statute is locked in, it becomes highly difficult to modify, and if Congress has carefully designed the law to be implemented in a way favorable to the coalition that enacted the legislation, it is possible to have an administrative state that reflects the views of members from decades long past rather than the wishes of the current majority.

### III. The Transformation of Congress and the Effect on Delegation

The political science insights described above provide important guidance on the mechanisms that incentivize or discourage delegations of legislative power to the bureaucracy. In summary, they suggest an ideal arrangement for expanding delegation, as well as an ideal arrangement for circumscribing it. Delegation is incentivized when a legislative body has powerful, autonomous committees that can prevent legislative drift by exploiting their veto power over legislation. This is especially true when committees' interests diverge dramatically from the interests of the rest of the chamber. Rather than compromising with other members to legislate collectively, these committees will fight to preserve the status quo and use their oversight powers to influence administrative policy. Delegation to independent agencies rather than executive agencies is facilitated by divided

government, and it is also facilitated as party cohesion in Congress declines, because the transaction costs of coalition building increase as disagreement increases.

These insights indicate that the greatest potential for limiting the delegation of legislative power to the administrative state is to focus on the cause, rather than policing the effect. Changing the bargaining environment in Congress by reforming its internal rules and structure can reduce the hurdles to collective action and the transaction costs that members face in building legislative coalitions. This Part first (briefly) describes the evolution of Congress over the last century, from a party-driven institution, to a decentralized, committee-based institution, to a mixed system in which leaders have recaptured some of their authority. It then argues that Congress can most effectively act collectively with strong, cohesive parties that have the tools to build and maintain legislative coalitions, reducing the transaction costs of legislating and disincentivizing delegation as much as possible.

#### A. The Decline and Resurgence of Parties in Congress

The power of political parties and party leaders in Congress has varied dramatically over the course of American history. By the post-Civil War period, party leaders in Congress had acquired enormous power due to the internal rules of both the House and the Senate. In the House, the Speaker determined the agenda and policy through three core powers: 1) the power of recognition, which was necessary to speak and offer motions on the floor, 2) the power to appoint members of committees, which allowed the Speaker to reward loyalty and punish dissent, and 3) chairmanship of the Rules Committee, which was the chief mechanism

for bringing a bill to the floor. By the end of the 19<sup>th</sup> Century, Speakers were referred to as “czars” and were arguably the most powerful figures in the national government, surpassing even the power of the President.

In the Senate, power was not as concentrated in a single person, but it was centralized in the hands of a few actors who influenced their colleagues through their control over a few powerful committees. In particular, control of the Committee on Committees, which made committee assignments, and of the Steering Committee, which set the legislative agenda, enabled a few members to dominate proceedings in the Senate. The “Senate Four”: Nelson Aldrich, William Allison, Orville Platt, and John Spooner, were able to centralize power in the Senate in much the same manner as it was centralized in the House.

Party leaders were dominant inside Congress in large measure because parties were powerful in general. During this period parties controlled the nominations of candidates at conventions rather than determining their nominees through primaries, and they possessed organizational resources through their control of patronage appointments and campaign funding.<sup>39</sup>

The consequences of this system of party dominance, both inside and outside of Congress, were polarization and legislative efficiency. Ideological sorting in Congress

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<sup>39</sup> While the Pendleton Act, which set up a civil service system, was enacted in 1883, it originally covered a very small portion of the national administration. During the 20<sup>th</sup> Century, the percentage of personnel covered by the civil service system was gradually increased.

reached its high point in the late 19<sup>th</sup> Century, and the rules were set up to enable the majority party to legislate efficiently.

This system declined rapidly in the early 20<sup>th</sup> Century, under the pressure of progressive reformers who argued that the system was unrepresentative. Theodore Roosevelt's attack on party government during the 1912 election, in which he conducted the most successful third-party campaign in American history, signaled the end of parties' control of nominations in conventions. Two years earlier, progressive Republicans and Democrats combined to strip the Speaker of many of his powers, in the St. Patrick's Day revolt of 1910. These developments enabled members of Congress to behave more independently of their parties. When running for office, they could run on their own personal platforms, which could be tailored to the local constituencies they represented. And when in Congress, they could function more independently of party leadership, which no longer had the powers to enforce loyalty to the party as a whole.

Congress's structure changed dramatically in the 20<sup>th</sup> Century to reflect this new, individualistic Congress. Instead of rules designed to facilitate legislation, power was decentralized into committees in order to facilitate delegation and oversight. Committee appointments and chairmanships were awarded on the basis of seniority, not on the basis of loyalty to party. This provided for autonomous committees that would supervise the newlyempowered bureaucracy. Political scientists – and politicians – began to use the language of “iron triangles” to describe the “subgovernments” that developed inside

Congress.<sup>40</sup> Rather than a Congress designed to legislate collectively, the internal structure of Congress evolved to authorize independent, individual action. Voting behavior changed accordingly, with increasingly divided government and ticket-splitting, as well as a dramatic increase in voters unaffiliated with either party.<sup>41</sup>

In summary, parties and their leaders were in nearly complete control of Congress during the late 19<sup>th</sup> Century, but over the course of the 20<sup>th</sup> Century parties went into steep decline. Political scientists took note. Based on the prominent work of E.E. Schattschneider, the American Political Science Association issued a report in 1950 calling for the restoration of party government. Two decades later, developments in Congress appeared to give them what they were demanding. Following the critical midterm elections of 1974, young Democrats, frustrated at the moderate and conservative Democrats who chaired powerful committees which they used to control the agenda, restored some of the powers that had been taken from the Speaker at the beginning of the century. The Speaker regained the power to appoint members of the Rules Committee, giving the power to control the agenda.<sup>44</sup> The Speaker also gained votes on the Steering Committee, which draws up the initial slate of committee assignments. Although these assignments must be formally ratified by the party

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<sup>40</sup> See especially Dodd and Schott, *Congress and the Administrative State*.

<sup>41</sup> There is vigorous scholarly dispute on the causes of increased party homogeneity in the electorate, with gerrymandering, ideological polarization in the American public, and party sorting variously mentioned, but

as a whole, this power to make the initial assignments enables the Speaker to take the initiative in the committee assignment process.

little debate that the parties have become more ideologically homogeneous. For a sample of the various viewpoints in an expansive literature, see Alan I. Abramowitz and Kyle L. Saunders, “Is Polarization a Myth?” *Journal of Politics* 70 (2008): 542-555; Morris P. Fiorina, Samuel J. Abrams, and J.C. Pope, *Culture War? The Myth of a Polarized America*, 3d ed. (Longman, 2011). But see also Jonathan Mummolo and Clayton Nall, “Why Partisans Do Not Sort: The Constraints on Political Segregation,” *Journal of Politics* 79 (2017): 45-59.<sup>44</sup> Perhaps the most prominent scholarly explanation of the emergence of party leadership, especially in the House of Representatives, focuses on “negative agenda control” or the cartel party leaders have on getting measures to the floor for a vote. Although this power does not guarantee the enactment of leaders’ positive goals, it does give leadership the power to veto measures that may even be favored by a majority of the chamber. See Gary W. Cox and Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (Cambridge: Cambridge University Press, 2005).

These developments towards the restoration of party leadership in Congress accelerated after the 1994 midterm elections, in which Newt Gingrich led a Republican victory providing majority control of the House for the first time in decades. Gingrich and his allies launched a sustained attack on autonomous committee government, passing rules setting term limits on committee chairs and slashing staff support.<sup>42</sup> Party leaders today have much more power in Congress than they had a half-century ago, but not as much as they possessed a century ago.

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<sup>42</sup> As Richard Armev, Gingrich’s second-in-command as Majority Leader, explained years later, “for the first 100 days leadership, not committee chairmen responding to interest groups, defined the entire agenda of the House. This change was important because it provided an opportunity to challenge – at least in the short run – the influence of special interests that drive the agenda at the committee level. Committees, which deal with a limited range of issues, have a parochial view driven by policy concerns. Leadership, in contrast, has a broader view that must balance the interests of competing committees and the legislative body as a whole.” Armev, *Reflections on the Republican Revolution*, in *The Republican Revolution 10 Years Later*, ed. Chris Edwards and John Samples, at 8.

The insights of PPT scholarship on delegation helps to evaluate the effects of these developments in Congress on its incentives to delegate. On the one hand, the attack on committees in Congress has undermined Congress's ability to build policy expertise that enables it to compete with the executive branch, creating information asymmetries that increase the costs members incur when they attempt to legislate. From this point of view, the decline of committee government has exacerbated the problem of delegation.

At the same time, the evolution of Congress during the last century provides a warning to those who call for a restoration of committee government as a means of controlling the administrative state. The height of committee government during the mid20<sup>th</sup> Century was also a period of extensive delegation of power to the administrative state.

Many scholars have noted the dramatic expansion of the administrative state during the 1960s and early 1970s, especially the wide discretion that was granted to agencies by the statutes enacted during the period. From the perspective of PPT scholarship, this is relatively easy to explain. The transaction costs of delegation were much lower under committee government, because committees could behave autonomously and control administrative policy through oversight, while collective action in Congress was onerous.

## **B. Fixing Congress to Restore It**

To incentivize Congress to act collectively, exercising its legislative powers rather than engaging in individual action through committees overseeing administrative implementation, the structure of Congress must marry the virtues of centralized party leadership and specialized committees. Committees enable Congress to gain the expertise necessary for reducing the information costs associated with making policy. But congressional committees are likely to be more reflective of narrow interests, because members seek to serve on committees which enhance their electoral prospects. Leaving these committees autonomous creates the problem of iron triangles and special interests that the administrative state thrives upon.

In order to prevent committee government from increasing the appeal of delegation, centralized party leadership is necessary to impose the national majority's policy wishes on a parochial committee system. Although Congress is designed to make its collective action difficult, parties are the best mechanisms for building and maintaining coalitions that can act collectively. As scholars from the "political realism" school have explained, parties and their leaders are important engines of compromise, which is the necessary condition for collective action among many individual members of Congress whose interests diverge. Richard Pildes, for instance, explains, "broader structural changes, including legal ones, have disarmed party leaders of the tools they previously had used to unify their members around deals that were thought to be in the best interest of the party as a whole."<sup>43</sup> Congress needs leaders with tools

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<sup>43</sup> Richard Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *Yale Law Journal* (2014), at 833.

to unify members, to reduce the transaction costs that stand in the way of collective action. The elimination of earmarks, the weakening of leaders' control over committee assignments, and other factors have weakened their ability to make the deals that are necessary for Congress to remain in control of its own power.

## Conclusion

Political science scholarship has much to offer legal scholars seeking to understand, and even to limit, the scope of legislative delegation to the bureaucracy. The thrust of PPT scholarship is that we must be more attentive to the role of politics and interest in Congress's decisions to delegate power and structure the administrative state, rather than confining ourselves to considerations of process and legality.<sup>44</sup> Congress is a critical source of administrative law, and its structure and incentives will determine the extent of delegation as much as formal legal doctrines enforced by courts.

Members of Congress do not delegate simply to abdicate responsibility, taking credit for pursuing lofty goals while punting the policy details to the bureaucracy. As scholarship has indicated, they carefully craft administrative structures and procedures to retain control over the bureaucracy, and even to guide administrative policymaking by incentivizing certain parties to constrain the agency's discretion on their behalf. They also respond to the bargaining environment in the legislature itself when deciding when and how much to

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<sup>44</sup> Lisa Schultz Bressman makes this point persuasively in "Procedures as Politics in Administrative Law," *Columbia Law Review* 107 (2007), 1751.

delegate. The difficulty, however, is that the bargaining environment in the legislature has broken down, leading to weaker leaders and fragile coalitions that are unable to act collectively. The best approach to limiting delegation, in an era of judicial underenforcement of the nondelegation doctrine, is to focus on the source of delegation. Congress is incentivized to delegate its powers because it lacks the internal structure to legislate efficiently. Restoring Congressional accountability, therefore, will be best accomplished by restoring the tools that encouraged it to legislate in the first place.