

Capturing the Public: Beyond Technocracy & Populism in the U.S. Administrative State

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The core problem of the administrative state is not its own legitimacy, but its role in creating a more wide-ranging legitimacy crisis in American society. The particular problem is that while government administration is necessary in a complex modern society, the mere existence of something as powerful as the bureaucracy is an invitation toward a kind of power politics that undermines the legitimacy of American government as a whole. We can best address this problem by ameliorating the administrative state's deliberative democratic deficit, whereby deliberation in the public sphere fails to play a steering role over politics at large. Doing so requires incorporating deliberative democratic practices into the American administrative state.

Nonauthoritarian regimes require legitimacy – the voluntary acquiescence to authority – to function well. Without legitimacy, administrative agencies, for example, would be unable to implement policy effectively. It is a potentially grave problem, then, that many observers regard the administrative state in the United States (and other consolidated democracies) as facing a “crisis” of legitimacy. Various camps differ in what they propose to do about the crisis, but they all agree on its basic origins and outlines. Populists decry the “deep state” encroaching on people’s freedoms by insulating itself from democratic accountability. Technocrats, in response, decry populists for politicizing the expert deliberation necessary to complex, modern governance. Pragmatists decry both as Manichean, while attempting to chart a middle course.

Rather than immediately taking sides in this debate, we first reexamine the nature of the crisis itself. We argue that the evidence is surprisingly weak for the existence of a crisis of legitimacy of the U.S. administrative state as a whole. Instead, the bureaucracy faces multiple, localized legitimacy crises. Specific agencies become subject to a kind of moral conflict characterized by *affective polarization* wherein we regard our opponents not merely as rivals but as enemies. If there is an overall crisis of the American administrative state, then, it results from the fact that these more local crises are becoming more intense and more common. Our

claim would seem to be a cause for pessimism: the administrative state is not typically regarded as either a cause of affective polarization or as a source of solutions; legitimacy problems, on these terms, would seem to “happen to” the administrative state, rather than be the product of some remediable institutional form.

Against this pessimistic view, we frame the legitimacy crises of the administrative state as a matter of a specific kind of *democratic deficit*: that is, a *deliberative* democratic deficit, whereby deliberation in the public sphere fails to play a steering role over politics at large. Unlike the going alternatives, we argue, first, that the potential for affective polarization is a structural feature of modern governance; second, that the administrative state plays a key causal role in explaining why liberal democracies like the United States face increasing levels of affective polarization; and third, that we can best understand the administrative state’s role in producing affective polarization as the product of a deliberative democratic deficit. Notably, none of the main approaches to the problem of administrative legitimacy provide a solution to this sort of democratic deficit, which leads us to propose our own institutional reforms.

Legitimacy is the voluntary recognition of authority. It exists alongside incentivizing carrots or de-incentivizing sticks: we follow the commands of a legitimate authority because we think it is the right thing to do, not merely because we stand to gain from compliance or lose from noncompliance. States, of course, govern through a combination of legitimacy and incentive structures. Many people follow the law both because they will be punished for not doing so, and because they view the law as legitimate.¹

But does the American administrative state face a crisis of legitimacy? In intellectual discourse, the answer would seem to be a resounding *yes*.² We can usefully identify three broad approaches to the legitimacy crisis of the administrative state.

First, those of a libertarian, constitutional originalist, or direct democratic persuasion tell us that the administrative state is generally the enemy of the American republic, since it is not only usually unlawful, but often immoral. We would be better off to be rid of it – there is no such thing as a legitimate administrative state, at least not in its modern form.³ For these critics, solving the crisis of the administrative state in institutional terms is a matter of dismantling it, as most of its functions can only be legitimately carried out through legislatures, markets, or civil society.

In contrast, supporters of technocratic expertise or a strong executive branch regard the administrative state as our ally in solving the complex problems of the twenty-first century; the only “illegitimacy” we need worry about stems from misunderstanding and ignorance or outside interference in the expert administration of professional bureaucrats.⁴ These thinkers may acknowledge the exist-

tence of a legitimacy crisis for the administrative state as it currently exists, but view the problem as being one of not enough high-quality administration. The institutional solution is, therefore, to expand the role of the administrative state and better insulate it from problematic outside interference.

Third, pragmatic reformers simply try to muddle through successfully. For them, the administrative state is less the subject of macrotheories about the future of the American republic, and more a quasinatural fact to be accounted for, planned around, and tinkered with in the way one might approach constructing a road through a perilous mountain range. Legitimacy is then a matter of working well enough in solving concrete problems, not radical change based on comprehensive ideologies.⁵ Institutional reforms are a matter of solving specific problems, rather than applying grand theory to the administrative state as a whole.

There is little apparent room for compromise among these three approaches: the first two are diametrically opposed on most issues, while the third views the other two as unrealistically grandiose and is itself viewed as small-minded. It is no surprise, then, that exchanges so far between the camps have been largely unproductive.⁶ Our goal, however, is not simply to choose sides among these contenders or compromise between them. Instead we question the one point of commonality across this debate: the existence of a general crisis of legitimacy in the first place.

All three approaches not only assume the existence of a crisis, they describe it as general: that is, challenging the whole administrative state. This notion of a general legitimation crisis, though, does not track well with empirical evidence. A more adequate narrative describes the administrative state as facing multiple localized legitimacy crises regarding different and changing issue areas and groups. We can find plenty of indicators of legitimacy problems for the state as a whole, of course. But public opinion polling suggests that American attitudes toward specific administrative agencies are relatively positive, at least when compared with other political and social institutions.⁷ Even the Internal Revenue Service (IRS) received an overall approval rating of 65 percent, and favorability toward Immigration and Customs Enforcement (ICE; the agency with the lowest approval rating) reached 46 percent; compare this with Congress at 13 percent, the Supreme Court at 40 percent, and the presidency at 39 percent.⁸

None of this is to say that we should ignore, for example, mass noncompliance with Centers for Disease Control and Prevention (CDC) recommendations on wearing masks during the COVID-19 pandemic, nor should we ignore the role the Tea Party has played in recent American politics, with a populist platform that takes aim at the administrative state.⁹ It is also worth noting that the Black Lives Matter movement has contested the police functions of the state. But mere contestation does not mean that there is a full-blown legitimation crisis vis-à-vis the public at large and the administrative state as a whole.

One might worry that the analysis so far suggests that the bureaucracy is in even more peril. The administrative state might seem to face several legitimacy crises rather than just one. Perhaps this moves too quickly, though; after all, what the evidence shows is just that different groups have differing visions of what the administrative state should look like. Our concern cannot simply be that there are debates about the proper scope of government. In the absence of a general crisis, then, is there any reason to view the more specific debates concerning particular agencies and their policies as problematic?

We will say that a crisis of legitimacy exists for a given agency to the degree that its policies are met with widespread or intensive resistance.¹⁰ There is no need for a bright line, but we have a crisis when resistance seriously threatens to cause the policy to fail. So, for example, the CDC is in the midst of a legitimacy crisis during the COVID-19 pandemic, as its policies have been met with widespread protests and noncompliance, which have produced precisely the spikes in cases that it was trying to avoid.¹¹ Or, to take another example, consider the negative reactions on the left to the detention policies of ICE during the Trump presidency, which included not only protests but also attempts to thwart ICE agents.¹² What unites these various crises is not any attribute of administration, it is not a matter of the administrative state being generally illegal or immoral or inefficient or irrational. Instead, crises are produced by a particular type of conflict, with the administrative state as the battleground.

What is it about the conflicts over CDC recommendations regarding COVID-19 or ICE's detention of immigrants that spark crises of legitimacy for those agencies? First, these are regarded as debates about principle, rather than issues of competition in pursuit of straightforward interests.¹³ Second, the principled conflict in question is particularly *deep*; there is little or unstable middle ground for compromise. Third, the conflict has been politicized: resolution is pursued via access to an administrative agency's policy-making process. Fourth, the opponents both possess the means to create a legitimacy crisis. Fifth, the different sides in the conflict see one another as *enemies* rather than *rivals*.¹⁴

Rivals view one another as legitimate opponents, while enemies do not. Rivals' and enemies' behavior may look similar sometimes, as both will act strategically to achieve their goals. But rivals recognize their opposition's right to exist and to compete, whereas enemies simply seek to dominate one another. Rivals play to win; enemies do not think their opponent deserves to play the game. Rivals view political struggle as a legitimate means of resolving conflict precisely because the conflict itself is regarded as legitimate. By contrast, enemies view the very fact that politics enables competition as itself an illegitimate recognition of their opponents' right to compete. By recognizing one's enemy, a political institution loses legitimacy, because an enemy lacks the standing to be so recognized on legitimate grounds.

This problem can be recast in more familiar terms by noting that regarding one's opponent as an enemy is essentially a matter of affective polarization. One's political beliefs become a core part of one's identity and thereby come to be the basis for negative moral judgments about individuals who do not share those beliefs.¹⁵ Those who disagree are not merely wrong, they are stupid or corrupt. Casting political enmity in these terms is useful precisely because there is a large literature that finds increasing affective polarization in the American public over time, specifically along partisan lines between self-identified Democrats and Republicans.

The real threats to the legitimacy of the administrative state are therefore tied up with an issue that arises from outside of the administrative state itself. Moreover, existing suggestions for how to reduce affective polarization do not involve much of a role for the administrative state.¹⁶ It would appear, then, that the administrative state might have to treat legitimacy like the weather: as something that happens to agencies regardless of their own behavior. If this is the case, then there is not much to be done; the legitimacy crises are likely to get worse before they get better, and there is nothing much that the administrative state can do about it.

We do not think the administrative state is so lacking in agency vis-à-vis its own legitimacy that the story ends there. Indeed, we argue that the administrative state is a major structural catalyst of affective polarization, and that the bureaucracy plays this role because of a major deliberative democratic deficit. In other words, the problem is not the administrative state becoming politicized per se, but rather that it has become politicized in the wrong way.

To build our argument, we need to define four related concepts: practical reason, the lifeworld, deliberation, and the public sphere.¹⁷ *Practical reason*, as opposed to instrumental or technocratic rationality, is concerned not only with evaluating the most efficient means to given ends, but also with the reasonableness of the ends themselves. The core question for practical reason in politics is "What should we do?" (rather than "How do I get what I want?"). We exercise practical reason in the context of the *lifeworld*, which consists of the unspoken, shared understandings that serve as the background people rely on to coordinate their actions.¹⁸ In politics, we exercise practical reason via a particular method of interaction: namely, *deliberation*, which in its simplest form involves individuals discussing what to do with one another in good faith and as equals in order to come to a mutual understanding.¹⁹ The *public sphere* is constituted by the whole of this discourse and is the space in which genuinely public opinion can form (rather than merely aggregated private opinions). If the lifeworld provides the background that enables us to communicate effectively, deliberation is the exercise of that potential in order to solve particular problems. Legitimate so-

cial coordination is the product of practical reason, exercised via deliberation in the public sphere, and conducted against the background of the lifeworld. Legitimacy will be lost, at least in the long term, without deliberation, because it is only through deliberation in the public sphere that we can realize our considered ends in a mutually consistent way.²⁰

Modern societies have become larger and more complex, and individuals increasingly fill specialized social roles differentiated from one another based on attributes like class, gender, race, ethnicity, and education, but also more mundane things such as what kind of music one listens to. All of this social differentiation tends to fracture the lifeworld such that coordinating action becomes more difficult.²¹ Thus, while the immediate causes of affective polarization might be things like a 24/7 news cycle, the rise of social media, or geographic sorting on factors that track partisanship, these explanations function within a wider societal context in which the traditional sources of solidarity have been undermined and people are casting about for alternatives.

The problem facing liberal democracies like the United States, then, is that they have come to be governed not by practical reason channeled through the public sphere and then into political institutions, but by various forms of technical rationality, which take ends as given and simply go about pursuing them in the most efficient way possible.²² How has technical rationality come to replace practical reason as the coordinating mechanism? The technical rationalities of the market and the administrative state gradually come to replace spheres of life that were formerly part of the lifeworld. Regarding the administrative state in particular, philosopher Jürgen Habermas describes it as operating according to a technical rationality of power.²³

The notion of technical rationality does not mean that Habermas thinks the substance of administration is simply the exercise of power. The point of a welfare state, for example, is not to exercise power over the recipients of welfare, it is to provide the needy with necessary aid. But the mere existence of an administrative state creates an opportunity for those who wish to dominate by controlling the bureaucracy. Groups can gain access to the machinery of the administrative state and then employ the bureaucracy to achieve their private goals. For example, whoever wins a presidential election gains control of the administrative state. Moreover, the administrative state has a tendency to continuously expand its scope in response to novel problems. But these conditions are not enough to induce a crisis of legitimacy because winning elections and expanding agency purviews could occur under the auspices of democratic deliberation.

The real problem emerges when competition over access to the administrative state comes to replace or preclude steering via deliberation in the public sphere. The process begins with the creation of a new administrative agency designed to solve some social problem, perhaps in response to public demand. The new bu-

reaucracy then starts to implement whatever sort of regulation or welfare services it was tasked with providing. So far, practical reason is still at least potentially the guiding force. The question arises, however, as to how to distribute the costs and benefits of the new regulation or welfare program. Public deliberation is one means of resolving this question. But now, this deliberation takes place against a background of power politics. All the parties know that they could, if they chose, forgo deliberation and attempt to access the administrative state through an exercise of power, an option that was not available in this domain before the creation of the new agency.

The effect of this backdrop of power politics is to make all the parties to deliberation aware of the possibility that deliberation itself could play a role in the balance of power: any party might decide to forgo deliberating in good faith and instead attempt to exploit the good faith of others to improve their own bargaining position.²⁴ The result, all else equal, is reduced trust between the parties to deliberation. In light of this reduced trust, parties might want to guard against being taken advantage of; the incentive is to work to shore up their own power base. One side's improvement of its power position comes at the expense of the other parties, should discussion turn sour. In other words, one party engaging in mere preparation for an exercise of power, even if only to resist the power of another, requires all the other parties to make similar preparations, unless they are willing to accept a reduced chance of accessing the administrative agency should deliberation fail.

Furthermore, the social practice necessary to enable good faith communication between the parties with regard to managing the win-or-lose logic of power politics – namely, deliberation in good faith – is precisely the social practice that the logic of power erodes. And once caught in this progression, it is unclear how to escape the cycle without forfeiting one's own chances of achieving victory; in other words, the only alternative to the competition over power seems to be an instrumentally irrational abrogation of power politics, which unless it occurs in the context of mutual disarmament, would simply make it easier for one's opponent to turn from deliberation to power. Indeed, the only way out of this logic would seem to be forgoing the creation of the new administrative agency entirely. But this would require whichever party had the power to create the agency in the first place to forgo the benefits of doing so, and for successors to that initial party to continue to forgo maximizing the potential benefits of control over the agency for increasing their own power, thereby reducing their own ability to resist the power of others. Power politics is a zero-sum game, and one cannot avoid playing by the rules unless they are willing to acquiesce to potential domination by others.

The outcome of this logic of power politics is that, all else equal, deliberation becomes increasingly difficult over time. But as noted, deliberation is the only stable source of legitimacy for social coordination. Taken together, this suggests that

over time, a particular area of social coordination dominated by power politics will tend to become less and less legitimate. It will be more and more difficult for the parties to a particular sphere of social coordination to come to a mutual understanding. If parties become unintelligible to one another, then it is easy to see how affective polarization could take root. To the degree that mutual understanding is lacking, opponents will appear as not just misguided, but as not guided by reason at all. The problem is that, because deliberation is displaced by technical rationality, groups are in a sense correct in assessing their opponents as unreasonable (though they rarely apply the same assessment to themselves). We lack the resources to use deliberation in the public sphere to assess our common goals, and therefore our opponents will find us immune to reason. Thus, they will feel forced to rely on the rationality of power.

Affective polarization, then, is a natural outcome of mutual unintelligibility between Democrats and Republicans. The reason that social media or geographic sorting might produce affective polarization is that they serve to reduce mutual intelligibility. This mutual unintelligibility has also arisen alongside a turn toward increasingly pure forms of power politics (such as obstructing Merrick Garland's appointment to the Supreme Court). Both elites and average citizens feel less compunction against violating informal norms of civility and restraint (what political scientists Steven Levitsky and Daniel Ziblatt call "forbearance").²⁵ Far from being like inclement weather, though, the administrative state plays a causal role in the rise of affective polarization and thereby its own legitimacy crises.

If the problem of affective polarization has its origins in a deteriorating life-world, then we can say that the legitimacy crises facing the administrative state are ultimately issues of a deliberative democratic deficit. The point is for the polity as a whole to be steered via popular deliberation, but this does not mean that we must replace our current institutions of government with mass deliberative bodies. Instead, we need to evaluate how various parts of the system, even if they are not directly deliberative themselves, can work together.²⁶ So a deliberative democratic deficit does not mean that an administrative state constituted by career bureaucrats is necessarily inimical to achieving a better system. The question, instead, is how an administrative state can effectively contribute to the deliberative quality of the system overall.²⁷ A deliberative democratic system would still likely need to have plenty of sites where actual, face-to-face deliberation occurs, but the administrative state can contribute to this project without itself being an essentially deliberative democratic institution.

Compare this approach to concerns about a democratic deficit without the deliberative modifier, such as have been raised regarding the European Union, and which seem to undergird concerns regarding the American administrative state.²⁸ Normally, a democratic deficit exists as a commonsense notion that unelected officials present a problem for the legitimacy of a given political institution. But it is

possible to have a standard democratic deficit and not a deliberative democratic deficit, and vice versa. Mere elections are inadequate to produce legitimacy, precisely because, as contests of political power, they can present a means of crowding out deliberation. And in contrast, one could well be concerned that a form of democracy without elections is not really democracy at all, no matter how deliberative, if the relationship between citizens and the government in such a situation is too attenuated.

To see this, consider that not all the components of a jury trial are deliberative. The process uses an antagonistic relationship between the lawyers to promote deliberative ends in the process as a whole. Lawyers are obligated to try to defeat their opponents by any legal means. Yet this central antagonism is controlled by the judge, setting limits on the contest and thereby ensuring that the consensus-generating device of the jury itself is not corrupted by the unfettered desire of both parties to win. The jury itself must reach consensus on what to do, and it can come to compromise solutions when faced with multiple charges or making sentencing proposals. A successful jury trial, then, employs adversarial means to produce a deliberative end.

Yet even with the institutions of a judge and jury in place, not to mention hundreds of years of practice in the conduct of jury trials, it is still not uncommon for the institution to “get it wrong.”²⁹ We should be dubious, then, that the political system, which is vastly more complex, does not face similar problems. This does not mean that the Constitution is not an impressive achievement, nor that it is unnecessary, but it is to suggest that its organizational capacities have been stretched to their limits over the course of its nearly 250 years. In other words, the Constitution is necessary, but likely not sufficient, to ensure that American politics is a deliberative system. The existence of legitimacy crises not only for the administrative state but also for American democracy suggests that, indeed, the antagonistic technical rationalities of competition over power and money are not well managed, and that major reform may be necessary.

The anti-administrative state position subordinates deliberation to democracy, while the pro-administrative state position subordinates democracy to deliberation. The problem is that unless we have both deliberation and democracy, legitimacy crises will recur and escalate over time. The third, “pragmatic” approach attempts to balance democracy and deliberation, but conceives of them in zero-sum terms, rather than as mutually constitutive. What is needed, then, is a specifically deliberative democratic solution to the problem of the specifically deliberative democratic deficit.

“Micro”-techniques of deliberative democracy are already being applied in public administration, though usually as a temporary and substantively bounded experiment. We briefly assess their record and recom-

mend that administrative agencies consider making them a more consistent component of the policy-making process. In addition, we argue that these microlevel deliberations can come to serve a macrolevel function in addition to their direct benefits. Just as jury trials enable citizens to better understand and appreciate the workings of the judiciary, so too can microdeliberations aid the cause of civic education. In addition to contributing to a better understanding of the administrative state, widespread participation in the conduct of governance could provide a countervailing force against affective polarization. Finally, because affective polarization is exacerbated by the winner-take-all nature of access to control over the administrative state, we recommend applying the institutional attributes that characterize “independent” federal agencies more broadly within the administrative state. Independent agencies carry several institutional features that insulate them from control by any presidential administration and enforce consensus decision rules within the agency itself, both of which can be helpful means of avoiding the pernicious logic of power politics.

Techniques such as citizen assemblies, participatory budgeting, deliberative town halls, policy juries, and deliberative polling have been employed around the world in a variety of political contexts.³⁰ What primarily ties these different approaches together is that they consist of discrete deliberations among specific people; it is in this sense that they are microtechniques of deliberative democracy. That is, these techniques attempt to implement deliberation in its most direct form – namely, discussion among citizens on some particular issue – with the aim of replacing the capture of administrative agency policy-making by elites and interest groups with “capture” by considered public opinion. In this way, current efforts at implementing deliberative democracy can be seen as an effective supplement to the institution of “notice and comment,” which was meant to expand public access to administration but mostly served organized interests.

These techniques have been quite successful in several respects.³¹ First, it seems as though achieving “real” deliberation is not only possible, but not particularly difficult with proper planning. Second, when placed in deliberative situations, citizens routinely manage to outperform the expectations of some of deliberative democracy’s more pessimistic critics. Participants typically manage to behave civilly and reasonably, and grasp complex issues when aided by experts. And even if they cannot reach a full consensus, participants typically report that they view the final difference of opinion as a matter of legitimate disagreement between reasonable parties rather than falling prey to the logic of affective polarization. Third, the final consensus (or informed dissensus) of deliberation has proven useful to those political institutions that have employed such techniques: for example, the final budgets produced by participatory budgeting processes function well and gain widespread support, and both elected officials and their constituents who participate in deliberative town halls report high satisfaction

with the proceedings. Deliberative democratic techniques have produced valuable results for participants, the public at large, and political elites. Nevertheless, we do not dwell on these outcomes here because they have been extensively treated elsewhere.

Rather, our argument is that their value may well extend beyond these known benefits. We can also employ them as a form of civic education, with the goal of providing a countervailing force against the logic of power politics and affective polarization. Such techniques could help citizens to appreciate how difficult the actual conduct and implementation of politics and policy are. By participating in the actual process of government, even if only in a limited way, individuals can come to see that politics is difficult, and that power is not as easy to wield over one's opponents as it might initially seem to a casual observer. For this to work, there needs to be something like mass participation in deliberation, and at a frequent enough rate to serve as an effective countervailing force against the logic of power politics. The point here is how deliberation benefits citizens directly, rather than how it can be used to better connect citizens with political elites, as valuable as that might be as well.

The administrative state would serve well as the site for this kind of large-scale institutionalization of deliberation. First, the administrative state is where most actual policy-making takes place, not to mention where such policies are applied to real world situations. Furthermore, the administrative state has resources in terms of personnel and physical infrastructure that other components of American government lack; the Supreme Court, for example, simply could not support large-scale deliberative institutions. Hard questions remain, of course. In particular, we need to consider how to fund and staff deliberations at the necessary scale and, further, how to encourage mass participation itself (few people think they will enjoy jury duty, after all). But the possible benefits of expanding deliberation should not be ignored, both in terms of making compromise more likely, and as a means of directly attacking affective polarization.

As noted above, affective polarization becomes especially pernicious when one or both opponents think they can come to dominate the other side, rather than merely wishing that they could do so. The possibility of achieving such a sweeping political victory is, of course, encouraged by politicians. Part of the solution is to help citizens better evaluate these kinds of claims via civic education. But another institutional response is to actively work to weaken the kind of winner-take-all decision rules that make a total victory seem possible. Winning an election and "winning" the overall contest with the opposing side in society are two quite different things, but the possibility of the former can make it easier to think that the latter is within reach. The problem is that we then simply contribute to greater affective polarization and a more fragmented lifeworld. Nor are the policies generated through this process particularly effective, precisely because barely

winning with regard to one majoritarian decision rule suggests that it is likely that one will not win the next contest decided by that rule, an outcome that could see the reversal of all of one side's policies in favor of one's opponent's policies. This is what we have seen, for instance, with regard to recent executive orders.³² Long-term policy planning is quite difficult when a new party gains something like total institutional control.

To solve these two problems we propose the expansion of a particular institutional form: so-called independent agencies. Such agencies are already widely used in American government, with the Federal Reserve system presenting the most obvious example. These institutions vary in their structure, but they tend to share certain features that both insulate them from the effects of winner-take-all decision rules (in this case, presidential elections), and enforce compromise or consensus decision-making within the agency itself.

With regard to dampening the lurches of the administrative state, there are two relevant institutional features of independent agencies. First, they tend to be run by boards consisting of several individuals, rather than a single appointed figure like a cabinet secretary.³³ Furthermore, the people serving on these boards are typically not all appointed by any single administration. Second, the board members tend to be removable by the president only for cause. Thus, a president cannot simply sweep into office and "clean house" at independent agencies like the Federal Reserve or the National Labor Relations Board. However, this is not the same as insulating independent agencies from politics, which would itself raise questions of legitimacy among those who reasonably worry about normal democratic deficits. Board members do not form a body like the Supreme Court, with lifetime appointments and removal only via impeachment; they are therefore subject to some of the same pressures as elected officials. The point is not to excise politics from the practice of administration, but to reduce the role of a particular kind of political contest that takes the form of winner-take-all decision rules. Indeed, in contrast with the Federal Reserve, the purpose of these "deliberative" boards would be less to ensure technocratic expertise, and more to ensure that considered public opinion receives due weight in the conduct of administration.

The second important feature of independent boards is that they tend to require some sort of consensus to make decisions. The goal is to ensure that enough members of a board agree on a particular policy or decision that at least one board member previously appointed by the opposing party is involved. Of course, some decisions may require something closer to unanimity, though the closer one gets to unanimity, the more likely a deadlock becomes. This is especially true since the board members at independent agencies serve as their full-time jobs, unlike in the case of a jury where its participants generally want to get the process over with so they can go back to their normal lives. The point here is to reduce the benefits of victory and the costs of defeat with regard to presidential elections.

Of course, not all administrative agencies are good candidates for this kind of institutional form. Perhaps the Department of State, for example, would be better organized as an extension of the president's will. But the Department of State is relatively unusual in this regard, and even there, while a full transformation into an independent agency is a poor idea, the incorporation of such boards into the agency at a lower level might well be helpful. For instance, we might think that presidents should be able to determine their own foreign policy, but should not be able to simply remove the United States from its international obligations at will. Some agencies, however, do seem amenable to a more thoroughgoing transformation into independent bodies: the Environmental Protection Agency (EPA), for instance, is often a site for policy whiplash between Democratic and Republican administrations, though losing direct control over the EPA does not seem to carry problematic implications for the president's powers in an emergency as the executive. It is worth considering, then, that the full transformation of an agency like the EPA into an independent agency would have beneficial consequences in attenuating the logic of power politics.

Of course, these changes, while in one sense radical, would not be enough on their own to eliminate legitimacy crises for the administrative state. But in combination with our other institutional suggestions, we hope that we have shown how the administrative state could play an important role in resuscitating a public sphere damaged by the affective polarization that the rise of the administrative state itself has driven.

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ENDNOTES

- ¹ On legitimacy, we draw in particular on the work of Tom R. Tyler, *Why People Obey the Law*, rev. ed. (Princeton, N.J.: Princeton University Press, 2006); and Tom R. Tyler, *Why People Cooperate: The Role of Social Motivations* (Princeton, N.J.: Princeton University Press, 2011).
- ² Phillip Wallach, “The Administrative State’s Legitimacy Crisis,” The Brookings Institution, April 20, 2016, <https://www.brookings.edu/research/the-administrative-states-legitimacy-crisis/>; Mark Bevir, “Legitimacy and the Administrative State: Ontology, History, and Democracy,” *Public Administration Quarterly* 37 (4) (2013): 535–549; Ryan Calo and Danielle Keats Citron, “The Automated Administrative State: A Crisis of Legitimacy,” *Emory Law Journal* 70 (4) (2021); K. Sabeel Rahman, “Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,” *Harvard Law Review* 131 (6) (2018): 1671–1712; Gillian E. Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017): 1–95; and Maggie McKinley, “Petitioning and the Making of the Administrative State,” *Yale Law Journal* 127 (2018): 1538–1637.
- ³ For recent work in this vein, see, for example, Richard A. Epstein, *The Dubious Morality of the American Administrative State* (Lanham, Md.: Rowman & Littlefield, 2020); Phillip Hamburger, *Is the Administrative State Unlawful?* (Chicago: University of Chicago Press, 2014); Charles Murray, *By the People: Rebuilding Liberty without Permission* (New York: Crown Forum, 2015); and Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017). For a review of judicial decisions in accord with this general anti-administrative state approach, see Cass R. Sunstein and Adrian Vermeule, “Libertarian Administrative Law,” *University of Chicago Law Review* 82 (1) (2015): 393–473.
- ⁴ For recent arguments in favor of a strong administrative state, see Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010); and Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Cambridge, Mass.: Harvard University Press, 2016). More moderately, see Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Random House, 2005); Cass R. Sunstein, *The Cost-Benefit Revolution* (Cambridge: The MIT Press, 2018); Cass R. Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013); and Cass R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (New Haven, Conn.: Yale University Press, 2014). See also Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford: Oxford University Press, 2014); Jerry Mashaw, *Creating the Administrative Constitution* (New Haven, Conn.: Yale University Press, 2012); Jon D. Michaels, “The American Deep State,” *Notre Dame Law Review* 93 (4) (2018): 1653–1670; and Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, Mass.: Belknap Press, 2020).
- ⁵ For contemporary work in a pragmatic key, see, for example, Wallach, “The Administrative State’s Legitimacy Crisis”; Christopher DeMuth, “Can the Administrative State be Tamed?” *Journal of Legal Analysis* 8 (1) (2016): 121–190; Metzger, “1930s Redux”; Aaron L. Nielson, “Confessions of an ‘Anti-Administrativist,’” *Harvard Law Review Forum* 131 (1) (2017): 1–12; and Mila Sohoni, “A Bureaucracy—If You Can Keep It,” *Harvard Law Review Forum* 131 (1) (2017): 13–31.

- ⁶ We are referring here specifically to the exchange between Vermeule and Hamburger found in Adrian Vermeule, “No,” *Texas Law Review* 93 (2015): 1547–1567; and Phillip Hamburger, “Vermeule Unbound,” *Texas Law Review* 94 (2016): 205–230.
- ⁷ Pew Research Center, “Public Expresses Favorable Views of a Number of Federal Agencies,” October 1, 2019, <https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/>; Pew Research Center, “Public Holds Broadly Favorable Views of Many Federal Agencies, Including CDC and HHS,” April 9, 2020, <https://www.pewresearch.org/politics/2020/04/09/public-holds-broadly-favorable-views-of-many-federal-agencies-including-cdc-and-hhs/>; and Gallup, “Confidence in Institutions,” 2020, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.
- ⁸ To be clear, the first poll gauges “favorable opinion” of particular agencies, while the second poll gauges “confidence” in the relevant institutions.
- ⁹ Ilya Somin, “The Tea Party Movement and Popular Constitutionalism,” *Northwestern Law Review* 105 (2011): 300–314.
- ¹⁰ Of course, agencies can face crises of confidence that do not implicate their political legitimacy, but instead their competence. Consider, for example, FEMA’s ineffectual response after Hurricane Katrina in 2005.
- ¹¹ Eric Lipton, Abby Goodnough, Michel Shear, et al., “The CDC Waited ‘Its Entire Existence for This Moment.’ What Went Wrong?” *The New York Times*, June 15, 2020, <https://www.nytimes.com/2020/06/03/us/cdc-coronavirus.html>.
- ¹² Alexandra Yoon-Hendricks and Zoe Greenberg, “Protests Across U.S. Call for End to Migrant Family Separations,” *The New York Times*, June 30, 2018, <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html>.
- ¹³ Amy Guttman and Dennis F. Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press, 1998). See also Georgia Warnke, *Legitimate Differences: Interpretation in the Abortion Controversy and Other Public Debates* (Berkeley: University of California Press, 1999).
- ¹⁴ This distinction is informed by work on “agonistic” democracy. See Chantal Mouffe, *Agonistics: Thinking the World Politically* (New York: Verso, 2013).
- ¹⁵ For an up-to-date review of the literature on affective polarization, see Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, et al., “The Origins and Consequences of Affective Polarization in the United States,” *Annual Review of Political Science* 22 (2019): 129–246.
- ¹⁶ *Ibid.*
- ¹⁷ The following discussion draws notably on the work of Jürgen Habermas, especially *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: The MIT Press, 1996).
- ¹⁸ *Ibid.*, 21–23.
- ¹⁹ *Ibid.*, 157–168.
- ²⁰ *Ibid.*, 68.
- ²¹ *Ibid.*, 25.
- ²² *Ibid.*, 27.

- ²³ Ibid., 39–40.
- ²⁴ This problem is quite clear in the context of international politics. See Thomas Risse, “Let’s Argue!’ Communicative Action in World Politics,” *International Organization* 54 (1) (2000): 1–39.
- ²⁵ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Broadway Books, 2018).
- ²⁶ On this approach to deliberative democracy, see John Parkinson and Jane Mansbridge, eds., *Deliberative Systems* (Cambridge: Cambridge University Press, 2013); and Michael A. Neblo, *Deliberative Democracy between Theory and Practice* (Cambridge: Cambridge University Press, 2015).
- ²⁷ On communication and the flow of practical reason between political institutions, see Michael A. Neblo and Avery White, “Politics in Translation: Communication between Sites of the Deliberative System,” in *The Oxford Handbook of Deliberative Democracy*, ed. Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (Oxford: Oxford University Press, 2018).
- ²⁸ For applications to the U.S. context, see Jeffrey R. Lax and Justin H. Phillips, “The Democratic Deficit in the States,” *American Journal of Political Science* 56 (1) (2012): 148–166; and Sanford Levinson, “How the United States Constitution Contributes to the Democratic Deficit in America,” *Drake Law Review* 55 (2006): 859–878.
- ²⁹ Brian H. Bornstein and Edie Green, “Jury Decision Making: Implications for and from Psychology,” *Current Directions in Psychological Science* 20 (1) (2011): 63–67.
- ³⁰ Bächtiger et al., *The Oxford Handbook of Deliberative Democracy*.
- ³¹ For a review of the positive qualities and outcomes of deliberative democratic techniques, see Michael A. Neblo, *Deliberative Democracy Between Theory and Practice* (Cambridge: Cambridge University Press, 2015); and Susan Dorr Goold, Michael A. Neblo, Scott Y. H. Kim, et al., “What Is Good Public Deliberation?” *Hastings Center Report* 42 (2) (2012): 24–26.
- ³² Juliet Eilperin and Darla Cameron, “How Trump Is Rolling Back Obama’s Legacy,” *The Washington Post*, January 20, 2018, <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/>.
- ³³ The U.S. Supreme Court has recently ruled in the *Seila* case that the heads of administrative agencies cannot have both for-cause protections and singular leadership (rather than a board), nor can such agencies go beyond “quasilegislative” or “quasijudicial” functions. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020).