

The Benefits of Agency Policy-making: Perspectives from Positive Theory

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Why would people prefer to have the federal agency resolve this problem rather than their own elected officials?

—John Nalbandian

The question posed by John Nalbandian is as old as the administrative state and as pressing today as it ever was. If politicians have a very limited ability to exert control over most of the policy choices made by unelected bureaucrats, does this pose a problem for the democratic legitimacy of the administrative state? Many positive theorists seem to think so. Unlike most public administration, administrative law, and bureaucratic politics scholars, positive theorists seem never to have gotten comfortable with the notion of agency autonomy. Some would attribute that discomfort to ideology, based on the supposition that positive theory analyses of law and politics lead inexorably to politically conservative conclusions (Lowi 1992; Mikva 1988; Hirshman 1989; Spann 1995; Brest 1988; Rubin 1991). Certainly, some aspects of the neoclassical economic model—particularly the assumption of self-interested behavior—do ignore elements of human motivation that make government work better, such as altruism, law abidingness, and cooperation. It is also true that seminal early works on positive theory, including early positive theory analyses of the administrative state, were at once penetrating positive analyses and powerful normative critiques of democratic decision mak-

ing, implying that less government might be better government¹ (Arrow 1951; Olson 1971; Niskanen 1971; Stigler 1971; Peltzman 1976). While later positive theorists were more optimistic about agency policy-making, that optimism tended to hinge on the contention that politicians could control agency discretion.²

However, positive theory scholarship need not be hostile to agency autonomy. Indeed, the normative argument in favor of the administrative state can easily be expressed in positive theory terms. The first step in that process is acknowledging that positive theory is more of a “how” than a “what.” It is an analytical method, one that employs the tools of economic analysis to analyze politics and law. With its emphasis on methodological individualism, the assumption that individuals are goal maximizers, and deductive logic, positive theory illustrates nicely the Madisonian argument for deliberative decision making in government and, I will argue, the modern administrative state. Thus, the analysis to follow echoes an older literature on “representative bureaucracy” and nonpositive theory defenses of administrative agencies as loci of deliberation (Meier 1993b; Rohr 1986; Seidenfeld 1992) and does not predicate the legitimacy of agency autonomy on the ability of elected politicians—Congress or the president—to control most agency policy choices. Rather, I contend that agency policy-making is legitimate because (1) it fulfills voters’ wishes irrespective of the ability of elected politicians to control what agencies do, and (2) it is consistent with our constitutional design.

Madisonian Liberalism, Positive Theory, and the Administrative State

It is certainly true that positive theory shares several important characteristics with Madisonian constitutional theory (Grofman and Wittman 1989). Both begin with the assumption that individuals are rational and self-interested, that an individual, when presented with a choice, will choose the alternative that maximizes his or her utility. Like Madison’s analysis of constitution building, positive theorists study the ways institutions might be designed to harness this ongoing process of individual goal maximization so as to produce the best possible collective outcome. Positive theoretical models of government tend to be Madisonian in another sense as well: they model the relationship between voters and their government from the classic Madisonian liberal perspective. All begin with the notion that rational voters participate in democracy primarily

through the election of their representatives (see, e.g., Mayhew 1974; Fenno 1978; Fiorina 1981; Arnold 1990; and Bianco 1994). This is, of course, the model of the voter associated with the seminal work of Anthony Downs (1957) and other positive theorists who have followed in his footsteps.

For that reason, it is fair to associate positive theory scholarship with one kind of conservatism—not political conservatism in the modern sense but rather the philosophically conservative view of citizen participation that is associated with the classical liberalism of Madison and Locke. Stated differently, it is difficult to envision a positive theoretical analysis of participatory democracy of the kind associated with Rousseau or Jefferson, one that is based on the notion of a reciprocal causal relationship between participation and civic virtue.³ By focusing on individual, purposive behavior and conceiving of voters as mere delegators of power to government, positive theorists seem to define away inspirational notions of virtue and of humans as social beings that we associate with Rousseau, Jefferson, and a more populist strain of democratic theory. Because positive theoretical models usually assume that individuals' preferences are fixed and endogenous, they have difficulty accommodating (or at least accommodating *well*) the idea that participation transforms the individual voter, producing civic virtue in the process. Indeed, this may be one reason why William Riker's positive theoretical analysis of these competing democratic theories offers such a forceful defense of classical liberalism, which is generally seen as the more conservative philosophy (1982).

Positive theory fits the Madisonian vision nicely, but does that imply a poor fit with the administrative state? Positive theoretical models of government have had little to say *directly* about the wisdom or desirability of the delegation of policy-making discretion to administrative agencies. As a rule, most disclaim any normative component and purport merely to analyze the relationship, without any explicit argument that particular kinds of power arrangements are "good" or "bad" in any sense. The so-called economic theories of regulation come closest to a self-conscious normative critique in their explanations of how rent-seeking interest groups secure agency-enabling legislation that provides those groups with private benefits while allocating the costs (costs that often exceed the benefits) to the general public (Stigler 1971; Peltzman 1976). But most positive theory analyses of administrative agencies are only indirectly critical

of agency autonomy. William Niskanen, for example, merely explains the growth of the administrative state as the product of budget-maximizing behavior by rational bureaucrats, given certain informational and other advantages agencies enjoy over their political overseers (1971). Likewise, proponents of capture theories use logic to argue that private sector rent seekers use their competitive advantages in the policy process to “capture” or undermine regulation in the long run.⁴ Yet another strain of the literature uses standard principal-agent models to demonstrate how politicians can control agencies (McCubbins, Noll, and Weingast 1987; Epstein and O’Halloran 1999; Bawn 1994, 1995).

However, while most positive theorists disclaim any normative agenda, it is easy to view these analyses of administrative agencies as indictments of the administrative state. Niskanen’s budget-maximizing bureaucrat, for example, shirks his duties and pads his own pocket. Capture seems to be an equally insidious notion, one that offers a ready justification for discrediting agencies and their actions. I have suggested elsewhere that this dim view of agency independence is due in part to a combination of (1) the methodological imperatives of positive theory scholarship and (2) social scientists’ desire to avoid normative issues (Spence 1997a, 1997b.) Economists value parsimony in model building, which helps keep problems tractable, particularly in the context of formal analyses. For that reason, most of the formal analyses of the delegation of policy-making authority use principal-agent models that posit elected politicians as the principals to whose wishes agencies may be more or less obedient. Given our existing constitutional design, in which voters have only an indirect relationship with agencies, any formal *descriptive* model of that relationship must posit a two-stage principal-agent problem. That added complexity may provide a powerful disincentive to analysis of the voter-agency relationship, leaving us with separate models of the two steps of that relationship that seem not to capture fully the value of delegation to voters.⁵

A Model of Voter Choice

Goal, Definitions, Assumptions

The question with which we began—of why voters might prefer decisions to be made by unelected bureaucrats rather than elected politicians—puts aside the two-stage delegation problem in order to focus on its normative dimensions. Returning to that normative question, I will

begin by positing the following goal of government policy choice, adapted from Lupia and McCubbins 1994a.

Goal: Voters want government to do what they would have done (e.g., what the median voter would have done) if they had the time and resources to devote to the problem.

By stating the goal in this way, I am posing the problem differently than in much of the delegation literature, particularly those analyses of the delegation of authority by voters to elected politicians that tend to view the problem as one of predicting outcomes. Voters are thought to have preferences over outcomes, not over policy choices; because voters cannot foresee outcomes, they must choose (to delegate policy choices to a particular candidate) based on some sort of decision rule that maps voter preferences over outcomes to the (candidate's presumed) policy choice.⁶ By contrast, this analysis assumes a more self-conscious version of voter uncertainty. Voters are not merely uncertain over how policy choices will be translated into outcomes. Rather, voters know that: (1) they lack the information necessary to make fully informed choices in the first place, and (2) their uninformed preferences over policy alternatives are in part a function of that missing information. Thus, this analysis assumes the relative desirability of deliberative policy-making over government by public opinion poll.

Recognizing that voters do not have the power to make direct choices about who makes policy—that their only direct recourse is against elected politicians—the analysis will examine the question of how voters *would* choose if they could. Assume, then, three sets of actors: *voters*, *elected politicians* (a unicameral legislature),⁷ and an *agency*.⁸ Assume further that individual voters and elected politicians have single-peaked preferences⁹ over a single dimension of policy choice. Let O_i represent any person's preferred policy choice, such that

O_A = ideal point of the agency on a policy dimension,

O_V = ideal point of the median voter on a policy dimension,

O_P = ideal point of the median elected politician on a policy dimension.

Assume further that each actor's ideal point (O) is a function of (1) the amount of accurate information that actor possesses (I) about the policy

choice, and (2) a vector or combination of that actor's values (V), representing the other internal influences on each actor's opinion.¹⁰ That is,

$$O = f\{I, V\}.$$

Therefore,¹¹ if

I_A = the amount of accurate information held by the agency,

I_V = the amount of accurate information held by the median voter,

I_p = the amount of accurate information held by the median elected politician,

V_A = vector or combination of values held by the agency,

V_V = vector or combination of values held by median voter,

V_p = vector or combination of values held by median elected politician,

and if

$$I_A = I_V = I_p \quad \text{and} \quad V_A = V_V = V_p,$$

then

$$O_A = O_V = O_p.$$

In other words, differences in opinion over policy choices are a function of, and are only a function of, differences in (1) the amount of accurate information the actors hold and/or (2) their values.

Argument

Decision Rule

Consistent with Downs, we can conceive of voters as rationally ignorant. For the vast majority of policy problems, busy voters choose not to devote the time or resources necessary to make a fully informed choice.¹² Policy choices may not be salient to voters and may escape their notice. Voters may be aware of the issues but have difficulty sorting through the information they are given by interest groups and others. In either case, voters do not acquire the information necessary to make a fully informed

choice. Elected politicians have more time to devote to policy-making and are therefore more informed/less ignorant about policy choices than voters are. However, because elected politicians are generalists within the field of policy-making, they too are rationally less informed/more ignorant than administrative agencies about policy matters within the agencies' jurisdiction. Not only do agency bureaucrats have more time to devote to specific policy matters, but they often bring more specialized expertise to the problem as well. Hence, we can construct a hierarchy of rational ignorance, such that for the usual policy choice $I_V < I_P < I_A$.¹³

Of course, I_V , I_P , and I_A are not static. Voters, elected politicians, and agencies are constantly gathering information and evaluating its accuracy. Indeed, voters in particular must face a barrage of information designed to persuade them and to change the location of O_V . Assuming that these actors are capable of separating good from bad information in the long run, we can infer that over the very long run the distance between I_V , I_P , and I_A will diminish or in some instances that voters will eventually acquire enough information to pass the threshold required to make an informed choice.¹⁴ That is, we might imagine the existence of a threshold of information beyond which additional information will have no effect on voters' preferences. For some issues, voters may acquire this threshold level of information over the long run. For many less salient policy choices, however, this hierarchy will continue, even over the very long run, such that most voters will never acquire the expertise necessary to make a fully informed choice. More importantly, this ignorance hierarchy is always present in the short run, extending from the time agencies first become aware of a policy issue through the early phases of its appearance on the larger public agenda.

Voters may understand this hierarchy of ignorance and may have a sense of the current ideal points (O) of the other actors. In other words, while voters may have opinions about some policy choices, they may also know that (1) there are other policy choices about which they are unaware or otherwise have no opinion and (2) some of the opinions they hold may be both relatively uninformed and information elastic.¹⁵ Thus, if differences in information accounted fully for differences of opinion across the three sets of actors, voters would always prefer to have agencies make policy choices. In that case, administrative agencies ought to be able to do the best job of choosing the policy voters would have chosen but for their information deficit, since agencies have more informa-

tion than politicians do. However, voters know that each actor's ideal point is also a function of its values (V), and voters cannot tell exactly what determines the difference between O_A , O_V , and O_P in any given case, because voters do not know precisely how their own values differ from those of politicians or agencies. This formulation of the problem, then, suggests the following decision rule.¹⁶

Decision Rule: If $|V_A - V_V| \leq |V_P - V_V|$, then voters prefer to leave the decision to the agency.

If $|V_A - V_V| > |V_P - V_V|$, then the result is indeterminate.

That is, if the agency's values are no more dissimilar to the median voter's values than are the median elected politician's values, then the median voter prefers that the agency make the policy choice, since the agency has access to the largest amount of accurate information. However, if the agency's values are more dissimilar, the decision depends upon how the opinion function translates information and values into preferences. Stated differently,

if $I_V = I_A$ would $O_A - O_V$ be $<$ or $>$ $O_P - O_V$?

The answer depends upon how much V_P and V_A influence O_P and O_A , respectively. Figure 1 depicts this problem. If voters had as much information as agencies do, would the median voter's ideal point (O_V) move (along the x-axis) toward the agency's ideal point (O_A) or toward the median politician's ideal point (O_P)? Because values are hidden, voters cannot know the answer to that question with any certainty.

This is, of course, a problem to which James Madison devoted considerable attention. That is, Madison's political theory gave central importance to the factors that guide policy choice, particularly the role of self-interest as a determinant of an actor's policy preferences. To Madison, even the best-intentioned public official could succumb to the problem of faction because one's view of the public interest is always colored by self-interest (Federalist 10). Thus, to Madison the problem of faction was not simply a problem of rent seeking. Rather, it concerned ways in which private interests could contaminate the pursuit of the public interest unintentionally or unconsciously as well. Madison suggested that voters can use information about actors' interests to inform political

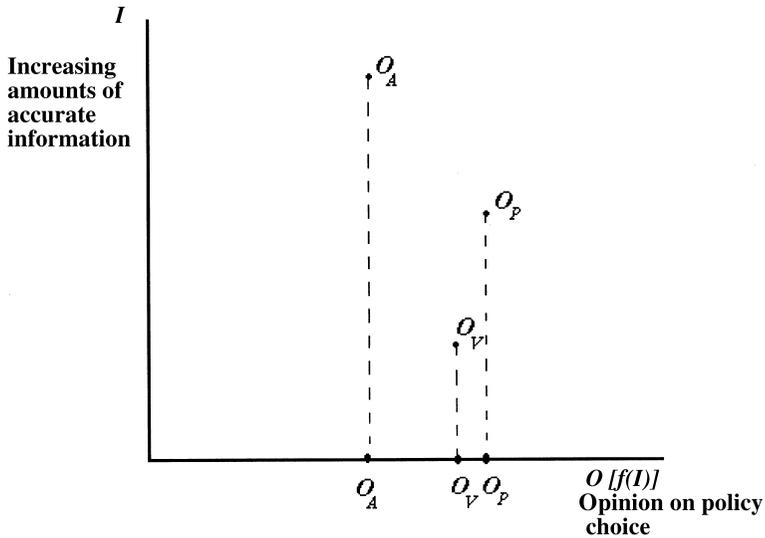


Fig. 1. Opinion as a function of information

decision making.¹⁷ Indeed, one of the major arguments in favor of vesting policy-making authority in elected politicians as against unelected agencies rests on this very notion. That argument states that the electoral connection between voters and politicians implies that $|V_A - V_V| > |V_P - V_V|$. I turn to that argument now.

The Electoral Connection Argument

Much of the hostility toward agency autonomy, both within positive theory literature and without, is predicated on the notion that since elected politicians are electorally accountable to voters and agency experts are not voters' values correspond more closely to those of their elected politicians than to those of the agency. The political science literature addressing the motives of elected politicians is large and rich. From that literature, we can distinguish (1) instances in which the policy choice is determined by an assessment of its electoral consequences from (2) instances in which the choice is made without concern for its electoral consequences. Some political scientists contend that most politicians' choices are motivated, first and foremost, by concern for their electoral consequences, or that this is at least the most useful working assumption (Mayhew 1974). Others emphasize "trust" as the key to an elected politician's ability to make

choices irrespective of their electoral consequences, noting that trust is itself a function of the electoral connection (Fenno 1978; Bianco 1994). Politicians build up trust by attending to the electoral consequences of their actions; that trust acts as a leeway account from which the politician can draw in the future to make policy choices that might displease constituents. If the key to election or reelection is securing voters' trust, it seems clear that one way politicians try to do this is by convincing voters that they share their values. Likewise, if the best way for a candidate to secure election or reelection is to convince voters that he or she will make wise policy choices, one way to get that message across in an uncertain multidimensional world is through this same sort of appeal to shared values. If we assume that voters are able to select candidates whose personal values reflect their own, in a world of divided government the median politician's values ought to be similar to those of the median voter.

Not only does electoral accountability suggest that $|V_p - V_v|$ is small, the positive theory literature suggests at least three different (and partly inconsistent) ways in which agency values are likely to differ systematically from voters' and politicians' values. The first of these involves *agency self-interest*: concepts like shirking, budget-maximizing bureaucrats, and the like are examples of ways in which agency self-interest undermines agencies' pursuit of the public interest. We can certainly imagine situations in which this is true. Agencies' self-interest is indeed implicated in budgeting decisions, and we infer therefore that in that context $|V_A - V_v| > |V_p - V_v|$. This might also be the case for agency decisions involving the expansion or retraction of agency jurisdiction or authority. For example, when an agency is charged with interpreting its own enforcement powers under a statute it may have every incentive to interpret the statute so as to maximize its enforcement leverage.¹⁸ Adopting an expansive interpretation of its own enforcement authority is one way the agency can ease the performance of its mission and tasks. Likewise, when agencies must make decisions about the reach of their own jurisdiction, self-interest propels them toward ever more expansive interpretations of the law.¹⁹ In these cases, we might expect the agency's values to differ from voters' and elected politicians' values in systematic ways.

Capture theory suggests a second set of systematic differences between agencies, on the one hand, and voters and elected politicians on the other—differences that implicate both values and information as determinants of preferences. One variant of capture theory focuses on

information, and suggests that industry captures an agency by virtue of the pervasive presence of industry, and *industry information*, in agency policy-making proceedings over the long term. After the initial interest in regulation surrounding the creation of the agency and the definition of its original mission has subsided, the proponents of the regulatory scheme lose interest in the problem and turn their attention elsewhere. The result is that the agency is presented with a skewed sample of information, leading to its capture by the very industry it was designed to regulate. Another variety of capture involves the complicity of congressional committees. According to this view, congressional committees populated by *ideological outliers* exert influence over the agency they oversee for the benefit of powerful industry constituents (e.g., Weingast and Marshall 1988). Over the long haul, the committee exerts influence over the agency's values, moving them toward its own and away from the median elected politician's and the median voter's.²⁰

Another strain of positive theory scholarship suggests yet a third way in which agencies' values are different and stands in partial conflict with capture theory. This literature focuses on the agency's "structure" as a determinant of its values, raising the danger of "legislative drift" or, more accurately, the *locking in of agency values* (McCubbins, Noll, and Weingast 1987; Horn and Shepsle 1989). That is, we can expect agency bureaucrats to have values that are consistent with the agency's mission; otherwise, the bureaucrats would not be attracted to work in the agency in the first place. Some positive theorists suggest that politicians are fully aware of this tendency when they design the agency and (re)define its mission (McCubbins, Noll, and Weingast 1987). Therefore, the agency's values will be consistent with the values of the winning legislative coalition that defined the agency's mission in the first place. Horn and Shepsle (1989) suggest that this poses a problem because V_A and V_P are likely to drift apart over time.²¹ While the statutory mission locks in agency values over time, voters' values are subject to no such stickiness. As time passes, then, agencies may come to be populated by an unrepresentative sample of the population—a sample that is more dedicated to the agency's mission than the population as a whole.

Rejoinders to Electoral Connection Argument(s)

There are several important reasons why the electoral connection argument does not adequately capture all of the important elements of the

decision calculus. First, the argument overstates the value differences between agencies, on the one hand, and politicians and voters on the other. Indeed, there are good reasons to believe that in many choice situations there are no systematic differences between the agency's values (V_A) and those of the median voter (V_V). Second, the argument leaves unexamined the relative magnitudes of $|V_P - V_A|$ and $|V_A - V_V|$ or it simply assumes that $|V_P - V_V| \leq |V_A - V_V|$. Finally, this argument sidesteps our decision rule by ignoring the relative importance of information (I) versus values (V) in determining preferences (O). That is, the decision rule states that even if $|V_A - V_V| > |V_P - V_V|$ the result is indeterminate; in that case, voters might still prefer agencies to make policy choices in those situations.

Rejoinder 1: Agency Values. Of course, positive theory analyses of the administrative state that stress the role of self-interest in agency decision making stand in stark contrast to a long, rich, public administration literature emphasizing very different values in agency decision making (Wilson 1887; Goodnow 1900; Weber 1946). In fact, many of the policy choices agencies make do not implicate the agency's self-interest. Rather, they involve statutory interpretations and decisions in which agency bureaucrats have no personal interest at stake—questions such as (1) Is this drug safe? (2) Under what conditions should polluting facilities receive permits? and (3) Should this anticompetitive activity be outlawed? For most of these kinds of commonplace policy choices, agency bureaucrats' values are not likely to be contaminated by self-interest. Stated differently, one can concede (1) that agencies care first and foremost about preserving their own existence, protecting their turf, and the like; and (2) that these considerations affect a large number of agency policy choices, without conceding that *most* agency policy choices are driven by self-interest. To the contrary, the great majority of policy choices are driven by other kinds of values.

Likewise, capture models paint an equally unrealistic picture of agency values. No family of positive theoretical models seems more irrelevant yet is more widely cited than capture models. Legal scholars and economists, in particular, seem enamoured of capture theory, much more so than political scientists. Regardless of its continued influence, the picture of agency decision making dominated by special interests, "iron triangles," and impenetrable "subgovernments" bears little relation to agency policy-making in the era of procedural openness and media hyperscrutiny. While

it remains true that industry enjoys enormous resource advantages over others in the struggle to influence policy-making in Congress and at the agency level, those resource advantages have simply not led to the kind of outlier-dominated policy process capture models describe. Part of this may be due to capture theorists' inability to foresee the rise of sophisticated, litigious, public interest organizations, open meetings laws, sunset legislation, and the like. In any case, few would argue that the Food and Drug Administration, the EPA, and the Federal Trade Commission act at the behest of industry (either directly or indirectly) when they decide whether drugs are safe, permits should be issued, or anticompetitive activities should be outlawed, respectively, or that industry's relative overrepresentation in the agency decision-making process has skewed the process in that way.²² The weakness of the tools of congressional oversight, the constraints imposed by judicial review, and the ossification of the administrative decision-making process all conspire with a more attentive public to impede capture.

That is not to say, however, that agencies' values are identical to those of voters. To the contrary, the argument that agencies are systematically more loyal to their basic mission seems persuasive, even obvious. People who are sympathetic to that mission *are* more likely to be attracted to work at the agency, and to the extent that the mission is articulated in the agency's enabling legislation interest groups and courts may try to hold the agency to that mission. All of this increases the potential for voter drift, described earlier. However, the problem of voter drift is minimized by the relative stability of values. That is, unlike opinions, values tend to be relatively stable over time. Certainly, people's values evolve; they are not static. Nor are they subject to rapid fluctuation. For example, we might hypothesize that one's attitude toward trade policy is a function of both ideology (liberal vs. conservative) and one's familiarity with neoclassical economic theory, which offers a powerful critique of protective trade barriers. Conservatives with low levels of economic expertise may be more favorably disposed toward free trade than liberals with low levels of economic expertise. As liberals gain familiarity with economic theory, some portion of them may come to view free trade more favorably. It does not follow from this that they are no longer liberals. Rather, their opinions are simply more information elastic than their values. In other words, while voter drift seems likely to occur, it also seems likely that voters' values drift apart (that $|V_V - V_A|$ grows) very slowly. Therefore, to the extent that

agency values reflect those of the median voter at the time the agency's mission was established, there is a reasonably good possibility that $|V_A - V_V|$ remains relatively small except in those choice situations in which V_A is contaminated by the agency's self-interest.²³

Rejoinder 2: Politicians' Values. What about politicians' values? It is true that elected politicians have no defined mission that prevents their values from drifting along with voters' values.²⁴ That argument notwithstanding, there are good reasons to suspect that self-interest contaminates the policy choices of elected politicians at least as often as it does those of agencies and that it does so in ways that do not contaminate subsequent agency choices. Even if voters do choose politicians who share their personal values, politicians' policy choices are not always driven by those personal values. Rather, the relative immediacy and complexity of the electoral connection for politicians offers a great deal of opportunity for values that differ from those of the median voter to influence the policy choices of elected politicians. Of course, positive theory offers a variety of reasons why legislative policy choices may not reflect the preferences (O_p) of the median elected politician. Outliers may be able to manipulate process so as to produce policy choices to their liking. Gatekeeping committees can facilitate this kind of capture of the process; indeed, some have suggested that Congress is organized precisely to produce this kind of result, citing a long history of logrolling that decreases social welfare. However, there are other reasons for believing that for any given policy choice the distance between V_V and V_p may be great, reasons that are based upon the complex forces that compete for influence over politicians' policy choices, even those of the median elected politician.

When an elected politician makes a policy choice so as to minimize the adverse electoral consequences of that choice at the next election, that decision may reflect a variety of values that are different from those that would have guided the median voter under those same circumstances. For example, elected politicians may be able to maximize the probability of reelection by attending to the interests of particular constituencies, such as those that make up the politician's core supporters, important campaign contributors, and the like. In addition, particular issues may be more salient to some groups than others, such that the politician can maximize the probability of reelection by making a policy choice that differs significantly from the choice the median voter would have made. Indeed,

as many others have noted, there ought to be a direct relationship between issue salience and the degree to which the politician's policy choice reflects the median constituent's preferences. In this way, elected politicians' self-interest—the desire for reelection—can contaminate the policy choice. Given the importance political scientists ascribe to reelection concerns in the decision calculus of elected politicians, it seems reasonable to conclude that this kind of self-interest contamination of preferences occurs at least as often for elected politicians as it does for agencies. While voters may try to elect representatives whose values match their own, voters may also suspect that many of the policy choices elected politicians make are not based primarily on those personally held values. This is indeed ironic. The reason why voters vote for the politician that is most “like me” is so that politician will make the policy choices “I would make if I were in that position.” However, the process of convincing a heterogeneous constituency that he or she is worthy of that trust leads the politician to make policy choices using a very different set of values. Hence, it may often be true that $|V_p - V_v| > |V_A - V_v|$.

However, if the agency is loyal to its mission, and the agency's mission is defined by Congress, one might ask why $|V_A - V_v|$ will ever be less than $|V_p - V_v|$. The answer is that Congress is more likely to be expressing the will of the median voter when it passes major enabling legislation defining the agency's mission than when it makes other, lower-salience decisions that might otherwise be delegated to agencies. This is the so-called republican moment explanation for major regulatory legislation (Schroeder 1998), one that echoes Anthony Downs's description of the “issue attention cycle” (1972) in the context of environmental law. When an issue captures the public's imagination, legislators face greater electoral risk and have a strong disincentive to deviate from the median voters' wishes.

Rejoinder 3: The Role of Information. When we reintroduce information into the decision process, we strengthen the relative attractiveness of agency policy choice. Recall that even if $|V_A - V_v| > |V_p - V_v|$ that does not imply that voters would prefer that elected politicians make the policy choice. This is because the agency always has more information than the median politician and politicians cannot (in the short run at least) acquire sufficient information such that $I_A = I_p$. Voters know this. Thus, even when $|V_A - V_v| > |V_p - V_v|$, voters have no clear preference under our decision rule. In this situation, voters cannot tell which actor would

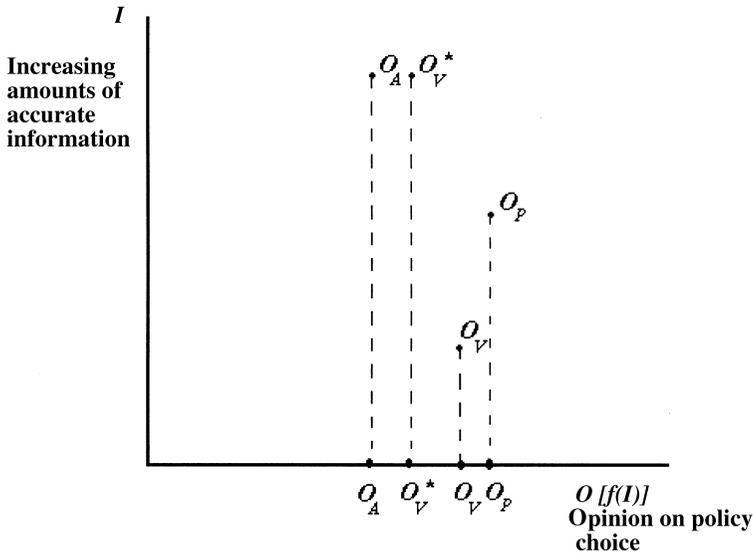


Fig. 2. Hypothetical voter opinion with information

make the “better” decision because they cannot know how each actor’s opinion translates values and information into preferences. For that reason, voters will discount the relative proximity of O_P and O_V in any given instance. In figure 2, voters know that when $|O_P - O_V| < |O_A - O_V|$ it is also true that $I_V < I_P < I_A$, and voters have no way of knowing whether the proximity of O_P and O_V is due merely to the distribution of information or to values. If O_V^* represents the median voter’s hypothetical ideal point when $I_A = I_V$, voters want government to be loyal to O_V^* , not to O_V . The problem, of course, is that while voters know that $I_A > I_P > I_V$ they cannot know with certainty the locations of V_A and V_P ;²⁵ nor can they ever calculate $|O_V^* - O_P|$ or $|O_V^* - O_A|$.

Why, then, might voters prefer delegation of decision-making authority to the agency given this uncertainty? There are at least two good reasons. One might be that voters’ believe they have a sense of the location of V_A and that $|V_A - V_V|$ is small. Voters may get a sense of the location of V_A from their knowledge of the agency’s mission. For example, if the median voter values environmental protection and knows that the EPA was created to protect the environment, the voter might prefer delegation of authority to the EPA even if he or she doesn’t know the location of V_P .

or O_V^* . A second reason why voters might prefer that a particular policy choice be made by an agency is their belief that information differences are accountable for differences in preferences over policy alternatives in the given choice situation. Voters may suspect that study and deliberation will produce something close to consensus, or at least suggest a clear majority-preferred alternative. In that instance, voters ought to prefer to vest decision-making authority in the administrative agency, where the decision will be relatively more insulated from direct interest group pressure.

There is no shortage of evidence to support this view of decision making. We can get some insight into the information elasticity of opinion by looking at the results of recent experiments in deliberative polling by James Fishkin and others. Fishkin's work involves panels of representatives of citizens whose preferences are measured before and after they deliberate on a particular public policy topic. The deliberation process involves not only the gathering and digesting of information but discussion among participants. In several different deliberative polling experiments covering a variety of subjects and respondents, Fishkin found that opinions change significantly as the result of deliberation and that run of the mill (non-deliberative) polling *misrepresents* informed (deliberative) public opinion. For example, one of Fishkin's deliberative polls sampled British public opinion on crime issues. Fishkin reported that after the deliberation process, "respondents showed an increased sense of the limitation of prisons as a tool for fighting crime" and "an increased willingness to support alternatives to prison" (1996). Of course, because most opinion polls are not deliberative, informed opinions are hidden. Elected politicians cannot respond to informed opinion; they can and do respond to less informed opinions about crime and punishment. As Fishkin notes, British participants in one of his deliberative polls seemed, after their deliberation, to be unrepresentative of British public opinion but "representative of the views the entire country would come to if . . . they actually had a better opportunity to think about the issues" (137). Likewise, because Congress and the president can never know the location of O_V^* , politicians who are responsive to electoral pressures do not necessarily choose the policies the voters want them to.²⁶

This same phenomenon is illustrated by the large literature on the perception of risks. A 1987 EPA study showed that there are vast differences between the way these two groups of people prioritize risks. For example, experts rank indoor air pollution as among the most serious risks

and hazardous waste disposal sites as among the least serious; laypeople reverse that ordering (EPA 1987). Some scholars attribute these differences to value differences between laypeople and experts and to other contextual factors that mediate lay perceptions of risks but not those of experts (Graham and Wiener 1995). There is a growing body of evidence, however, showing that when laypeople can overcome the information deficits they face their preferences over risk reduction priorities tend to look much more like those of experts. For example, a 1991 comparative risk project undertaken by the state of Vermont and the EPA enlisted laypeople to study and deliberate before prioritizing environmental, health, and safety risks. The result was a ranking that was typical of experts' risk rankings (State of Vermont 1991). Thus, if (1) voters' preferences are highly information elastic, (2) voters know this, and (3) there are many policy choice situations in which voters' values tend not to differ significantly from those of agency experts, then it makes sense that voters might often prefer to vest decision-making authority in administrative agencies rather than their elected representatives.²⁷

Accountability and the Risk of Error

However, despite the fact that voters might prefer to have agencies make certain policy decisions, might there still be good reasons to prohibit agency policy-making? That is, even if there are good reasons to suspect that agencies will do a better job than politicians of choosing policies at or near O_V^* , one might ask whether that suspicion is wrong. What is the risk associated with placing authority in the wrong hands? The electoral connection argument suggests that if politicians choose poorly at least voters can correct that error through the discipline of the ballot box. This is not so with administrative agencies. Agencies are not directly electorally accountable, and political control of agencies is difficult and costly (Spence 1999a). Therefore, there is a danger—a greater downside risk—associated with agency autonomy. However, that danger is overstated *even if* political control is difficult and costly. The reason is because in the long run political control is more likely and more effective when the agency has chosen poorly—that is, when it has deviated greatly from O_V^* —and less likely and less effective when the agency has chosen well by choosing a policy that is close to O_V^* .

Why? Recall that the distance between O_V^* and O_V increases as I_V increases. As voters acquire more and more accurate information, they are

increasingly able to judge for themselves whether O_A is a good or poor approximation of O_V^* . In the usual case, voters do not acquire enough information to make that judgment. However, when the agency chooses a policy that lies a great distance from O_V^* interest groups and political entrepreneurs who oppose the choice will mobilize. If they suspect that $|O_V^* - O_A|$ is large, those groups and politicians have a strong incentive to supply voters with more information; they will try to increase the salience of the issue among voters because it is to their advantage to do so. (By the same token, it is to their advantage not to try to increase the salience of agency policy choices they favor if they suspect that those choices deviate significantly from O_V^* .) Indeed, in a world of scarce resources it would be irrational for an interest group opposed to an agency policy to engage in a sustained lobbying effort against the agency choice if it suspects that $|O_V^* - O_A|$ is small. Of course, this is not to suggest that those agency policy choices are not the subject of lobbying efforts. Interest groups are constantly flooding voters with information designed to move O_V in a favored direction, and voters are constantly filtering, ignoring, and using that information. The important point is that in the midst of all that noise interest groups, strategic politicians, and other information providers (such as the news media) have a systematic incentive to devote more effort to educating voters about agency policy choices that deviate significantly from O_V^* .

Because of this relationship between O_V^* and the agency's policy choice, voters should acquire more information and develop more expertise over time with respect to policy choices that deviate greatly from O_V^* . If, as I_V increases, voters discover that $|O_V^* - O_A|$ is great, political momentum to reverse that choice legislatively will grow as political entrepreneurs in Congress or the presidency see electoral benefits to be gained from championing the issue. Similarly, a rational agency will also be more likely to resist change when $|O_V^* - O_A|$ is small (and less likely to do so when $|O_V^* - O_A|$ is large), reasoning that that resistance will tend to lead to increases in I_V . That, in turn should provide a disincentive to elected politicians to continue the fight when $|O_V^* - O_A|$ is small. This is a commonly observed dynamic. During the first Reagan administration, environmental interests and their congressional allies successfully opposed the policies advanced by new EPA administrator Anne Burford, despite the president's electoral margin, perceived deregulation mandate, and personal popularity. Environmental groups suspected (correctly, it turned out) that the Burford EPA was pursuing policies that deviated greatly

from O_V^* . By contrast, more recent efforts by business groups and conservative Republicans to reverse or roll back EPA policy choices have been short-lived, and have failed, in part because moderate Republicans have correctly surmised that the EPA policy choices lie closer to O_V^* than the Republican-sponsored alternatives. Thus, in the long run indirect electoral discipline is likely to bring O_V^* closer to O_A over time.

Of course, the long run can be a long time. What about agency policies that deviate from O_V^* in the short run? Can we rely on courts to police this short-run deviation problem? That depends. Sometimes the agency's policy choice deviates from O_V^* because it reflects the agency's relatively greater loyalty to its mission (reflecting a large distance between V_V and V_A). In that case, courts will usually let agency choice stand. While judicial review is based upon the notion that the agency decision should, first and foremost, be faithful to the statutory mandate, agencies are given wide discretion in interpreting that mandate. However, sometimes the agency's policy choice deviates from O_V^* because it is contaminated by the agency's self-interest, for example, by financial gain or through increased jurisdiction or increased enforcement leverage over regulated parties. Then the case for according the agency great deference is less compelling because the decision may be based on factors other than those traditionally used by the courts to justify agency autonomy. Courts accord the agency discretion because agencies have expertise or because agencies seek the president's or their own ideological goals. Courts do not justify autonomy based upon the agency's self-interest.

Irrespective of whether agencies tend to choose well (i.e., whether they often approximate O_V^*), and whether their poor choices can be corrected in the long run, one might ask whether broad delegations of authority to agencies are consistent with constitutional theory. Perhaps the nondelegation doctrine reflects a constitutional preference for policy-making by elected politicians, one meant to prevent not only poor policy choices but the making of those choices in the first place. In other words, delegation allows government to produce *too much law*. This argument, however, is misplaced.

First, as others have noted, while the argument I have made here seems to be superficially inconsistent with Madison's (and the other founders') design, it is entirely consistent with their concept of democratic theory. The founders sought to create a system in which government could produce decisions that were *imperfectly* responsive to majority opinion. The Federalist Papers are replete with distinctions between immediate and

permanent preferences and admonitions against government attending too readily to the former and not readily enough to the latter. Madison warned not only of ideologically narrow or geographic factions but also of factions based upon passions.²⁸ In Federalist 63, Madison makes it clear that government ought to be designed to prevent “temporary errors and delusions” from dominating the decision process and that the “cool and deliberate sense of the community” ought to be reflected in policy choices (Federalist 63).²⁹ By insulating Senate decision makers from direct electoral pressure (through indirect election and six-year terms) the founders sought to create an environment conducive to deliberation and the development of expertise. In Madison’s words, the electoral accountability of members of the House of Representatives made that body prone to “temporary errors” in which the house might lose sight of its “true interests.”³⁰ Senators, by contrast, would be able to acquire “a competent knowledge of the public interests,” resist “fickleness and passion,”³¹ and have “sufficient permanency” to provide for such objects as require a continued attention” (Federalist 63).

Of course, the Senate is no longer insulated from direct electoral pressure in this way. Administrative agencies are. Indeed, many of the traditional justifications for delegating responsibility to administrative agencies echo the concerns of Federalist 63—the need for a decision-making environment in which individuals can devote long-term attention to complex problems. John Rohr has made a careful and persuasive argument that administrative agencies serve the deliberative function that the Senate once did (1986). When voters express a preference for vesting decision-making authority in administrative agencies, they echo the arguments of the founders. In the twenty-first century, only agencies have the opportunity to make fully informed decisions; if it is true that direct electoral pressures promote factionalism and interfere with deliberation, then agency policy-making seems relatively consistent with the view of democratic decision making advanced by Madison and Hamilton.

On the other hand, it is one thing to conclude that agency policy-making is “like” the kind of decision process the founders envisioned for the Senate; it is another to conclude that it serves exactly that same constitutional function. The Senate represents one part of a tripartite constitutional system for producing laws. In the constitutional scheme, each of those bodies must agree to produce legislation: either the House, the Senate, or (absent a legislative override) the president can veto legisla-

tion. When they agree not to make a policy choice, but rather to delegate it to an agency, they circumvent that constitutional process, or so the argument goes. However, the fact that politicians cannot agree on all of the specifics of a policy choice does not undermine their conclusion that some change, within very general boundaries, is desirable (Mashaw 1998). The argument against agency autonomy seems to suggest that Congress ought not to have that option available to it and to promote form over substance. Agency policy-making is efficient in that it offers the opportunity for flexibility and adaptation in policy-making that would not be available were politicians forced to make each and every specific policy choice. Further, the executive power implies delegation. That is, public administration and public management scholars have long viewed as ridiculous the notion that there is some sort of bright line distinction between making and implementing the law. Implementation implies policy choice (Lipsky 1980; Brehm and Gates 1997; Mashaw 1998). These are the reasons we have traditionally offered to explain the creation of the administrative state.

Conclusion

I have attempted to demonstrate that positive theory need not be hostile to the administrative state. On the contrary, it offers a new and precise way to articulate one of the principal rationales for agency autonomy: the notion that expert agencies can sometimes do a better job of giving voters what they want than politicians can. The technology of positive theory offers a useful way of breaking down the choice process and of thinking about the role of information in that process. In so doing, it helps us to understand why policy-making by unelected agencies is consistent with democracy and our constitutional design.

Notes

The author would like to acknowledge the helpful comments of the editors and the participants in the Fifth Annual Public Management Conference, College Station, Texas, December 3–4, 1999.

The John Nalbandian quotation that appears at the beginning of the essay is from a personal communication with the author (1996). Nalbandian, mayor of

Lawrence, Kansas, at that time, was commenting on public attitudes toward a controversial development proposal in Lawrence.

1. Some economists and legal scholars have gone further, suggesting that legislation should be thought of as nothing more than interest group deals and that much of it is designed to provide rents (private benefits) to powerful organized interests. As a consequence, most legislation reduces social welfare (Easterbrook 1983).

2. There were some exceptions to this rule (see Hammond and Knott 1996; Bendor 1995; Bendor and Moe 1985, 1986; and Miller 2000). Other exceptions are found in the literatures on central bank independence (Hassapis 1996; de Haan 1997; Eijffinger and de Haan 1996; and Eijffinger, Hoerberichts, and Schaling 1996) and transaction cost explanations of bureaucratic organization (Williamson 1990, 1991; Moe 1997).

3. Of course, Arrow's theorem is sometimes interpreted as proving the impossibility of such an analysis.

4. There are at least two different varieties of capture theory. Under one version, capture takes place with the complicity of congressional committees via iron triangles, subgovernments, and the like. Another version argues that after an initial burst of interest in regulation the general public eventually loses interest in agency policy-making, leaving only regulated interest groups to participate in the process. Eventually, the agency is persuaded to adopt the policy preferences of the regulated industry, based in part upon the skewed information set with which the agency is presented (Kolko 1966; Ferejohn 1987).

5. See Krause 1996a for another critique of principal-agent models of this relationship.

6. For example, Douglas Arnold's model of voter delegation works this way. Voters evaluate the probability that a particular candidate will choose a policy that produces the outcomes voters want based upon an evaluation of the candidate's past record.

7. This conflates all elected politicians into one decision-making body and assumes that the median voter within that body, the "median elected politician," controls the outcome of decisions made by that hypothetical body. Of course, that is not how decisions are actually made, though in an era of divided government it might be a fair approximation in that ideological moderates usually must be satisfied in order to produce a government decision.

8. Of course, this assumption sidesteps questions about how agencies decide by treating the agency as a unitary actor. This is not to imply that I think agencies are unitary actors, nor is that assumption crucial to this analysis. For reasons outlined subsequently, I assume that agencies can be said to have preferences that are reflected in the decisions agencies produce, regardless of how individual bureaucrats' preferences are translated into agency preferences.

9. That is, the distribution of individual preferences is single peaked such that individual utility over choices falls (at the same rate in each direction) as the distance between the individual's ideal point and the selected policy choice grows. Of course, collective (voter or politician) preferences need not be single peaked in order for the collective to make a policy choice.

10. Think of values (V) as a representation of all the internal forces that determine how an individual translates information into preferences. This is, therefore, a broader use of the term than the dictionary definition.

11. One might argue that this conception of the determinants of preferences is another way in which this model differs from models of participatory democracy, in which external forces (social relations) exert powerful influences on opinion. On the other hand, we can think of values (V) as representing both internal and external forces that influence public opinion, in which case notions like "civic virtue" might be included within V .

12. This is not to suggest that voter choice is meaningless or that democracy fails as a consequence of voter ignorance. Rather, I mean only to begin with the proposition that voters are relatively ignorant about policy choices—and systematically so—compared to elected politicians and agencies.

13. This description of the information hierarchy implies a deterministic (rather than stochastic) view of the information variable. That is, while I do not assume that information levels are constant, nor is information a random variable. I do assume the continued existence of this information hierarchy, and the conclusions drawn in the "Rejoinders to Electoral Connection Argument(s)" subsection depend upon that assumption.

14. An example of the former type of policy choice might be abortion policy. Policy choices that require technical expertise—like many of those within the jurisdiction of regulatory agencies—are more likely to fall into the latter category.

15. As Lupia and McCubbins (1998) argue, voters can gather information about policy choices from media, interest groups, and other sources. But consistent with Downs (1957), it is irrational for voters to overcome their information deficits for most policy choices. That is, voters remain relatively ignorant deliberately and rationally and are conscious of the fact that their opinions are conditioned on this relative ignorance.

16. It suggests this decision rule if we can conceive of V as quantifiable or as a point on an ordered dimension.

17. This is the core insight in Lupia and McCubbins's model as well. They argue that voters can assess the trustworthiness of government actors by examining the context in which they speak. For example, if the government actor's position entails "costly effort," indeed, they contend that delegators of authority can design institutions that facilitate reasoned choice by making it costly for agents to lie (1998, 70–76).

18. For example, the Environmental Protection Agency (EPA) has adopted an expansive interpretation of its own authority to enforce the federal Superfund Law, an interpretation that serves the agency's interests (Spence 1999c).

19. For example, during the latter part of the twentieth century the Army Corp of Engineers, the Federal Energy Regulatory Commission, and the EPA benefited from a series of court decisions that expanded their regulatory jurisdiction by expanding the definition of the term *navigable waters* under the Rivers and Harpers Act of 1899, the Federal Power Act of 1935, and the Clean Water Act of 1972, respectively.

20. This view depends upon several strong premises. First, it assumes that oversight committees are ideological outliers. Second, it assumes that committees, not the congressional majority, control the tangible ways in which elected politicians influence agencies' budgets, legislative mandates, and so on. Third, this view assumes that ex post control by committees is effective.

21. McCubbins, Noll, and Weingast (1987) suggest that legislators can minimize the problem of agency drift by clearly defining the agency's mission and otherwise structuring the agency to adhere to that mission. Indeed, this is one logical ex ante response to the problem of capture, that is, specifying the agency's mission, coupled with the opportunity for interest groups to hold the agency to that mission using litigation, is one way for legislators to try to guard against capture. There is ample evidence in support of the notion that agencies do a good job of adhering to the original mission and that their values tend to reflect that mission (Spence 1999a).

22. For example, Cary Coglianese has examined interest group participation in rule-making proceedings at the EPA, finding that industry participation dwarfs participation by environmental groups. Yet that overrepresentation does not seem to be translated into influence in the process. ("Challenging the Rules," 47–51, manuscript on file with author).

23. Of course, the agency's mission is not static, and so neither are its values. Politicians can and do redefine the agency's mission. We might expect that redefinition to provoke subsequent changes in the agency's values. This possibility further minimizes the expected amount of voter drift in any given situation.

24. Indeed, the electoral connection argument maintains that elections redefine the politician's mission over time.

25. One could argue that the agency's specialized mission gives voters a clearer picture of V_A than they can get of V_P .

26. Some (but not all) of Fishkin's deliberative polls show that differences of opinion become moderated as a result of the deliberation process. In another deliberative poll conducted in Austin, Texas, he found that, while respondents were split on their support for foreign aid, after deliberation support for foreign aid solidified and they tended to agree with one another more than they had at

the outset. If information deliberation produces more agreement, or with less widely dispersed preferences, we might infer that information and deliberation can produce better decisions.

27. It should be noted that Fishkin advocates the use of deliberative polling to increase citizen participation in politics and to enhance the quality of representation by elected officials. His is not an argument for delegation by the uninformed to the better informed.

28. See Federalist 49, in which Madison argues that “it is the reason, alone, of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”

29. See also Hamilton’s arguments in Federalist 6, in which he distinguishes momentary impulses from more permanent interests of the community.

30. Speech of James Madison, June 26, 1787, in Max Farrand, the records of the federal convention of 1787, 1937.

31. *Ibid.* These same concerns are reflected in Federalist 62 (“the necessity of a Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of a sudden and violent passion, and to be seduced by factious leaders into intemperate and pernicious resolutions”).