

The Political Origins of the Administrative Procedure Act

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For a decade after the passage of the Second New Deal, political leaders and many important interest groups fiercely debated what procedural requirements, if any, should be imposed on the new regulatory agencies. This debate led eventually to the passage of the Administrative Procedures Act (APA) of 1946. The purpose of this article is to explain the significance of the various procedural requirements that were considered, and to develop and test a political theory of why some proposals were passed while others were rejected, and why a decade passed before legislation could succeed. Although the APA typically is seen as a codification of individual rights in a system or procedural due process, we argue that to answer these questions requires understanding the policy consequences of alternative procedural reforms. Thus we develop and test a political theory, based on the views of legislators about the proper role of the federal government in regulating business, that seeks to explain patterns of support and opposition to legislative reforms. We conclude that the dominant factor explaining these patterns is support for New Deal regulatory policy, and that the primary explanation for the failure of administrative reform proposals before World War II but their success later was the desire of New Deal Democrats to “hard wire” the policies of the New Deal against an expected Republican, anti-New Deal political tide in the late 1940s.

The twin goals of procedural justice and agency control were noted in the Report of the Senate Judiciary Committee accompanying the proposed act: the act “is designed to provide . . . fairness in administrative operation” and “to assure . . . the effectuation of the declared policy of Congress” (U.S. Congress, 1946:252).

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The Administrative Procedure Act (APA) of 1946 is arguably the most important piece of legislation governing federal regulatory agency policy making. The APA established the basic operating rules of regulatory agencies and articulated the principles of procedural due process for individuals caught up in the regulatory process. As such, it served to codify, rationalize, unify, clarify, and extend the operating procedures of all federal agencies.

The APA has had far-reaching effects on the course of economic and social regulation. First, the act provided a reasonably complete definition of the procedural rights of individuals. The key elements were some modest protection of individual rights (primarily the property rights of those most significantly affected by administrative agencies) through expanding rights of participation in rule-making procedures, and substantially stronger protection of these rights in the enforcement of these rules. Second, the act was the first step in the creation of a body of law which has the political effect of biasing policy in favor of the status quo [Noll (1976); Owen and Braeutigam (1978); McCubbins, Noll, and Weingast (1987)]. By reducing administrative discretion, formal procedures create transaction costs that increase the time and resources needed to change policy. By enhancing the power of the court to overturn agency decisions, formal procedures give organized interests that seek to preserve the status quo a second bite at the apple.¹ Third, notwithstanding the status quo bias, the formal procedures established by the APA forced agencies to take into account and respond to the policy preferences of many relevant interests, not just those favored by the president and his appointees [see, e.g., Cohen (1979)].

The APA has been the subject of an enormous body of legal scholarship. This work focuses nearly exclusively on two types of issues: the philosophical underpinnings of procedural due process and the APA's effects on regulatory efficiency. Most of this literature is normative, evaluating the act according to the extent to which it furthers effective governance and protects due process rights. This debate revolves around hoary constitutional issues, such as the meaning of due process and the extent to which delegation of policy implementation to the bureaucracy constitutes an antidemocratic abdication of control over policy by Congress [Aranson, Gellhorn, and Robinson (1982); Mashaw (1985)].

Only occasionally do legal scholars analyze the political circumstances surrounding the APA's passage. According to most legal scholarship, the purpose of the APA was to codify and rationalize existing practice of procedural due process that had percolated in a haphazard manner through the courts in the 1930s.² According to this account, the passage of the act was uncontroversial. Gellhorn (1986: 232), for instance, states: "The measure was approved on May 24, 1946, without a recorded vote and with no indication of dissent. Thus, in

1. Of course, as pointed out by Mashaw (1985), this benefit to some private interests and to political officials who sought greater control over agency decisions came at the cost of reducing the flexibility and increasing the cost of agency decisions.

2. See, e.g., most of the articles in the special issue of the *Virginia Law Review* (1986) celebrating the APA's 40th anniversary. An important exception is Shapiro's (1986) critique of the standard view in the same issue and his book on administrative law (Shapiro 1988).

an atmosphere of happy accord, ended what had begun as an exercise of the imagination.” Gellhorn and Davis (1986: 521) assert, “The real reason the Administrative Procedure Act did not cause a great turmoil when it was enacted was that to a considerable extent it is declaratory.”

The development of positive political theory (PPT) has caused scholars to pay more attention to the politics of administrative law and its implications for the more prosaic *political* causes of the act. While PPT does not deny that normative principles motivate political action, its adherents focus on how political institutions and the career objectives of elected officials shape political decisions. This focus necessarily leads scholars in positive theory to look at a broader range of motives for legislation and, even if enduring normative principles appear to have been paramount, to ask why action was taken when it was, rather than years before or years later. And, perhaps more importantly, why were some normative principles enshrined in legislation, while others were not? In analyzing the origins of legislation, then, the core issues of positive theory are whose interests were advanced by its passage and how it affected the balance of influence among agencies, the legislature, the presidency, and the courts.

Very little work in the positive political analysis of administrative procedures, with the notable exceptions of Shapiro (1986) and Shepherd (1996), has focused on the origins of the APA itself. More frequently, the focus is on the enactment and implementation of policy-specific programs.³ However, the passage and structure of the APA presents many puzzles for PPT and the study of law more generally. For example, why did New Deal Democrats change their position on procedural due process and agree to pass procedural limitations on agencies in 1946? Furthermore, why did the parties in Congress form a “grand coalition” in favor of the APA? Why did it take until 1946 to codify procedural due process, given that much of the APA had been proposed a decade before? Why did Congress enact some proposals regarding procedural due process but not others? The purpose of this article is to address these puzzles.

Two profound partisan changes that took place in the 1940s provide answers to many of these questions. First, New Deal Democrats realized that their prospects for retaining the presidency were growing increasingly dim after Roosevelt’s death in 1945. The New Dealers could no longer count on an executive administration that was sympathetic to New Deal policies and that would continue to implement its policies more or less in the ways that New Dealers preferred. This fear provided New Deal supporters with the incentive

3. Much of this research focuses on programs created since the passage of the APA. See, for example, Olson (1995) on the Food and Drug Administration, Romano (1997) on the Commodities Futures Trading Commission, and Cornell, Noll, and Weingast (1976) on OSHA. Others examine programs that predate and to some extent gave rise to the APA. Examples of studies applying positive political theory to the political origins and substantive importance of administrative procedures in legislation predating the APA are Fiorina (1981), Gilligan, Marshall, and Weingast (1989) on the Interstate Commerce Act of 1887, O’Halloran (1994) on the RTAA, and Shipan (1997) on the Communications Act of 1934.

to consolidate the gains of the New Deal thus far. Second, following 13 years of unbroken Democratic control of the presidency, the character of the judiciary had changed substantially from the high point of conflict between 1932 and 1937. As a result, the New Dealers no longer feared a combative relationship with the courts if they delegated to them the responsibility to enforce the procedural due process requirements. In sum, by 1946, the New Dealers in Congress had an interest in consolidating their policy gains against the possible antipathy of a Republican presidency, and they could finally count on the courts to favor New Deal programs in adjudicating procedural provisions.

The importance of this argument, if true, is that it demonstrates that more was at stake in the establishment of administrative procedure than fairness, equity, concern for individual liberties, and administrative efficiency. Because the very future of the New Deal was at stake, political preferences over economic outcomes as well as prosaic political strategizing and coalition building played major roles in shaping the foundations for the present administrative state. Liberal Democrats accepted legislative formalization of procedural due process and a greater role for judicial review only when it appeared to be advantageous to their interests and when combined in a logroll that consolidated the gains of the New Deal and empowered Congress vis-à-vis the executive.

The argument of this article should not be read as implying that the normative aspects of the APA were unimportant. Indeed, a critical aspect of the APA is that it served multiple purposes. New Dealers refashioned and combined existing procedures, each with a normative rationale, so that they also served political ends. Normative goals are attractive for their own sake. In addition, procedures serving both normative and political ends would be more likely to survive in the courts and through future sessions of Congress than procedures serving political ends alone. As the normative aspects of procedural due process have been widely explored, we focus on that part of the story that is less well-known.

The structure of this article is as follows. Section 1 reviews in general terms our previous argument about how procedural provisions have policy effects. Section 2 applies this argument to explain why Democrats shifted to favor procedural constraints during the early 1940s. Section 3 examines some of the details of the provisions of the APA and addresses how those provisions contained a compromise over policy and procedure between the three partners in the grand coalition. That is, this discussion explains how the provisions of the APA served to consolidate the gains of the New Deal while affording greater protection for individual rights. This section also compares the provisions of the APA and the (failed) major effort by the Conservative Coalition to establish procedural restraint on New Deal agencies in the Walter–Logan bill of 1939–1940. The comparison of the APA and the Walter–Logan bill examines the provisions of each act, the partisan conditions surrounding each bill, and the coalitional support favoring each. This section argues that the vastly differing fates of the APA and the Walter–Logan bill—one passing by voice vote with grand coalition support and little presidential opposition, the other passing Congress on a strict Conservative Coalition vote and being vetoed by FDR—can be explained by changes in partisan conditions from 1940 to 1946.

Sections 4 and 5 contain statistical tests of part of our argument. Section 4 produces evidence about the structure of preferences among members of Congress during the period to ascertain whether they are consistent with our theoretical assumptions. Section 5 analyzes the votes on the Walter–Logan bill to ascertain whether economic policy preferences of members explain the patterns of opposition and support for the bill. Section 6 concludes.

1. The Policy Consequences of Administrative Procedures

This section first provides an overview of the institutions of delegation, and then discusses two dangers that Congress encounters in delegating to the bureaucracy: agency drift and political drift. Second, it contains a formalization of the legislature's choice of procedures governing the agency relationship, which is used to develop intuition about the political conditions under which Congress would be expected to establish procedural constraints on agencies. In the next section, the intuition from this theoretical model is applied to analyzing the timing and form of the APA.

Delegation of policy-making authority to administrative agencies is potentially attractive to elected officials. Doing so enables them to write simpler statutes, allows the details of policy to adjust to new knowledge and changed circumstances, and creates an expert body that can provide useful information about the needs for changes in either legislation or appropriations. However, delegation creates two distinct problems for elected officials: agency drift and political drift. Agency drift refers to the circumstance when an agency adopts policies that are not consistent with the agreement among elected officials that is embodied in its statutory mandate, and corresponds to the idea that an agency is autonomously "out of control" in pursuing its agenda. Political drift arises when an elected official has sufficient power to cause the agency to adopt policies that differ from the policy agreement among the coalition that enacted the statute, a coalition that includes the president if enacting the statute did not require a veto override.

With respect to agency drift, bureaucratic decision makers are advantaged if they can act in secrecy and present political officials with a policy decision as a *fait accompli*. When significant differences of opinion divide the House, Senate, and President, corrective legislation is not possible.⁴ In this circumstance, if an agency deviates from the original policy (within certain bounds), at least one of the three branches will prefer the deviation, dooming corrective legislation. Yet *ex ante* all parties may prefer to prevent the possibility for *ex post* deviations. The three potential bases for such a preference are as follows: *ex ante*, each actor believes that unfavorable agency drift is more likely than favorable drift; each agent is risk averse and so prefers not to enter into a policy lottery; or each agent, while not personally risk averse, seeks to avoid policy instability because it can adversely affect constituents who want to make long-term commitments that depend on the legal environment.

4. For the complete theoretical argument about the conditions under which legislative reversal of a *fait accompli* is not possible, with an application to environmental regulation, see McCubbins, Noll, and Weingast (1989).

Political drift arises from a different problem. If a legislative agreement represents a compromise of significant differences, at least some parties to the compromise would prefer to alter the policy *ex post* if given the opportunity. Even if legislation is not controversial when enacted, future elected officials may prefer a different policy, and welcome an opportunity to alter the legislative agreement. If the institutional arrangements governing the delegation of authority give some subset of elected officials influence over an agency—such as a congressional committee through its oversight responsibilities or the president through appointments of agency leaders and judges who review agency decisions—these officials can pull policy decisions away from the coalition’s legislative agreement in ways that could not be achieved by statute (McCubbins, Noll, and Weingast, 1989). If the officials who cause political drift are veto players in the legislative process (such as majority party leaders in Congress, chairs of congressional oversight committees, and the president), the old coalition agreement cannot be restored by corrective legislation. Although political drift will benefit some elected officials, members of the enacting coalition may still seek protection against it *ex ante* because of uncertainty about which political official will be the source of political drift in the future. Furthermore, as Moe (1989) persuasively argues, organized groups that support a new statute understand the problem of *ex post* deviation and so demand *ex ante* protection against it, thereby inducing their representatives to seek means of preventing political drift.

In the absence of tools for ameliorating agency and political drift, elected officials would find delegation far less attractive. Two types of authority are delegated to agencies: power to make concrete and explicit the policies enacted in a statute (or rule making), and power to enforce compliance with these policies by private parties (or adjudication). In both types of decisions, an agency can be regarded as picking an outcome from among a large number of feasible decisions.

In practice, Congress and the president possess several tools to influence ongoing agency operations. One category consists of direct controls through the budget (Kiewiet and McCubbins, 1991) and other aspects of “fire alarm” intervention (McCubbins and Schwartz, 1984; Weingast, 1984; Lupia and McCubbins, 1994). In addition, as emphasized in the positive theory of administrative law, members of the enacting coalition can include provisions in new legislation to create a structure and process that channels and constrains agency decisions. The point of these procedures is not to predetermine policy outcomes, but to create a decision-making environment that mirrors the political circumstances that gave rise to the establishment of the policy, thereby inclining the agency to serve the same political constituencies that were the intended beneficiaries of the original statute (McCubbins, 1985; McCubbins, Noll, and Weingast, 1987; McCubbins and Page, 1987; McCubbins, Noll, and Weingast, 1989). Finally, members can enlist the judiciary to protect against both forms of drift by enacting provisions for judicial review of agency decisions (McCubbins, Noll, and Weingast, 1987; Shipan, 1997). Indeed, a central element of the positive theory of administrative agencies is that the courts play two significant roles: to some degree courts enforce the procedural requirements of administrative law by threatening to vacate decisions by agencies that are procedurally flawed;

but to some degree courts also try to impose their own policy preferences on agencies and legislators. Because of the latter possibility, the decisions by elected officials about delegation and administrative procedures depend upon their expectations with respect to the subsequent behavior of the courts.

The positive political analysis of administrative law generates some ideas about the policy effects of administrative procedures. The formalization of administrative procedures performs three essential tasks. First, formalized procedures advantage organized interests, which makes possible the frequent observation that regulated firms sometimes capture regulatory agencies.⁵ Second, formalized procedures facilitate political control of agencies both by enabling effective oversight and by stacking the deck in agency proceedings in favor of the interests that were paramount in the passage of the agency's enabling statute (Cohen, 1979; McCubbins and Schwartz, 1984; Weingast, 1984; McCubbins, 1985; McCubbins, Noll, and Weingast, 1987, 1989; Kiewiet and McCubbins, 1991; Bawn, 1995). Third, formalized procedures increase the influence of the legislative and judicial branches at the expense of the executive (Weingast, 1984; McCubbins, Noll, and Weingast, 1987; Kiewiet and McCubbins, 1991).

In imposing administrative requirements on agencies, elected officials need a conceptual model of agency decision making: what agencies, when left alone, are likely to decide, and how administrative procedures are likely to change these decisions. Only with such an understanding can elected officials rationally choose the best structure and process for the agency. Implicit in the positive political theory of administrative law is a theory of the bureaucracy of something like the following.

Denote the outcome of a rule-making proceeding and an adjudication as R and A , respectively, and denote the policy agreement among the elected officials who enacted the policy as R_0 and A_0 . Although we make little use of this distinction in developing the theory, we trace the theory in these two tracks to emphasize that our analysis applies to both rule making and adjudication. The procedural requirements that have been placed on agencies are more rigorous for adjudication than for rule making, so that agencies generally are regarded as having more discretion in the latter type of proceeding. But the presence of greater discretion does not lead to the conclusion that agencies will decide to engage in substantial drift. The reason, as developed in the theory, is that even in rule making, procedures increase the cost of making decisions that are secure against judicial appeals by creating informational burdens on the agency, such as demonstrating the correspondence of the regulation with the statutory mandate and that the rationale for the rule is based on admissible and reasonable evidence. Even if the agency, in principle, could defend a decision that represented policy drift, it will choose not to do so if the costs of defending that decision are too high. The theory to follow traces out the logic of this argument and its implications.

5. On capture, see Bernstein (1955), Stigler (1971), and Owen and Braeutigam (1978). For more general views of interest group capture, see Peltzman (1976) and Noll (1983), and for a synthesis of this literature, see Noll (1985).

Assume that agency decision makers have preferences over the outcomes R and A , and face costs of making decisions that depend on the structure and process of the agency. Let $U_a(A)$ and $V_a(R)$ represent the value an agency places on A and R , respectively. Assume that U and V take maximum values at A^* and R^* , and for convenience that the second derivatives of these functions are negative. The origins of agency preferences can take one of two forms. Perhaps they reflect the particular and unique preferences of agency officials, in which case the quest to implement A^* and R^* represents agency drift. Or perhaps these preferences are those of an elected official (the president who appointed agency officials or the chair of the congressional committee that engages in oversight of the agency), in which case the problem is political drift (see Calvert, Moran, and Weingast, 1987; Weingast and Moran, 1983; Shipan, 1997).

Next, assume that the way that more administrative complexity affects agencies is by imposing costs of making decisions of the following form:

$$C(A) = K_a(P_a) + f_a(|A - A_0|, P_a) \quad \text{and} \\ C(R) = K_r(P_r) + f_r(|R - R_0|, P_r),$$

where K_i , $i = \{A, R\}$, is a component of the cost of a decision that depends only on the complexity of the procedural requirements, P_i , imposed on the agency, and f_i is the other component of decision costs that depends on both the procedural requirements and the magnitude of the deviation of the agency's decision from the coalition's agreement.⁶ Assume both K_i and f_i increase at constant or increasing rates in P_i , and f_i also increases at a constant or increasing rate in the magnitude of the departure of its decision from the agreement of the enacting coalition.⁷

The idea behind separating costs into two components is to highlight the dual effect of procedural complexity. First, procedures create an incentive to bring decisions more in compliance with the wishes of elected officials. Second, procedures also raise the costs of all decisions, whether complying or not. These procedural costs also have two important and contrary implications regarding the efficiency of government regulatory policy.

If elected officials enact a statute that is designed to improve economic efficiency, such as to compensate for an environmental externality or to constrain the behavior of a monopolist, procedural requirements are analogous to transaction costs in any principal-agent relationship. If agents (here, regulatory agencies) would prefer not to solve efficiency problems because they are lazy or captured, procedures impose a penalty on them if they do not adjust their behavior to comply with the efficiency objectives of regulatory policy. Presum-

6. The notion that procedures rule out some decisions can be incorporated in this framework by letting the decisions costs be so great (e.g., infinite) and outside the feasible limits of policy choice. Assume that an agency would never make infeasible decisions.

7. These conditions require that marginal costs be nondecreasing in procedural complexity and the distance of the policy from the coalition's agreement. These conditions assure an internal solution to the agency's maximization problem.

ably if elected officials delegate policy to agencies at some procedural cost, the reason is that the costs of procedures are not so great as the alternative costs of specifying policies in detail on their own, through more elaborate statutory language. In this case, procedural costs can be regarded as a cost of producing policy, which is part of the overall efficiency maximizing problem of elected officials.

Of course, elected officials will not necessarily care only about improving efficiency, but also may seek to construct procedures that benefit one organized interest at the cost of another organized interest or of citizens in general, such as when statutes establish a regulatory institution that is intended to create and to manage a cartel in an otherwise competitive industry. Here drift may take the form of pulling policy toward a more efficient policy (e.g., undermining the cartel by promoting competition). In this case, the procedural costs of preventing drift, while arising from technically the identical agency problem, nevertheless are an additional source of inefficiency in the policy. The cost of inefficient policies, then, includes both the marketplace inefficiency that the policy creates plus the administrative cost of procedures that force the agency to produce inefficient outcomes when it might otherwise prefer to promote efficiency.

Formally, the agency presumably picks the most valuable decisions that are feasible, given its budget constraint. The agency problem is then as follows:

$$\max_{A, R} U_a(A) + V_a(R) - C(A) - C(B).$$

If decision costs are zero, the agency will pick its most preferred outcomes, A^* and R^* . As noncomplying decisions become more costly to the agency, the agency's decisions will move away from A^* and R^* and toward A_0 and R_0 .⁸

In picking procedural requirements, elected officials anticipate the relationship between procedures and the degree of compliance with their policy agreement. These officials can be modeled as maximizing the value of agency decisions, net of the costs of procedural requirements to elected officials.⁹ Using the same notation, the elected official's problem is as follows:

$$\max_{P_a, P_r} U_e(A) + V_e(R) - C_e(A) - C_e(R),$$

subject to the constraint that the agency will pick A and R to maximize its wel-

8. These conclusions summarize the first-order conditions and comparative statics analysis of the agency's maximization problem.

9. One natural interpretation of the procedural costs experienced by elected officials is in terms of their loss of support among constituents who also face costs from procedural complexity. Another natural interpretation is the cost to elected officials of responding to fire alarms. Still another is the budgetary cost and lack of flexibility in operating procedurally complex agencies, which is Mashaw's (1985) argument against elaborate procedural due process requirements. The key point about these costs, however, is that in some cases political actors might find these costs to be small compared to the expected cost of an agency that was beyond their influence.

fare (i.e., that the first-order conditions of the agency's maximization problem will be satisfied). If elected officials impose no procedural requirements, of course, the agency will pick A^* and R^* . Hence elected officials will make no use of procedures to prevent policy drift *only if* the agency's ideal policies are at or near the preferred policies of all members of the coalition that enacted the agency's governing statute. Thus we have the following hypothesis:

Proposition. A necessary condition for the absence of procedural requirements is that all members of the enacting coalition have basically the same policy preferences and appoint bureaucrats who share these preferences.

This condition can occur when a government that is united by both partisanship and ideology creates a new agency and appoints its administrators, including its high-level civil servants as well as its top political leaders. This hypothesis also has a corollary, which basically takes the form of a comparative statics prediction:

Corollary. If the preferences of the members of the enacting coalition diverge (from unified purpose) sufficiently, the necessary condition for the absence of procedural requirements is not satisfied, in which case members of the enacting coalition will favor procedural restrictions on administrative agencies; moreover, these restrictions will increase in complexity as the divergence of preferences among members of the enacting coalition also increases.

The hypothesis that we offer is that the proposition and its corollary describe the conclusions before and after World War II, respectively. In 1940, New Deal policies appeared secure with Roosevelt firmly in control. In 1946, the New Dealers could look down the road and see the possibility that a Republican president would be elected in the near future, and so they could anticipate that the presidency's ideal point would diverge from their own. The next section provides a historical overview of the period and shows how the worsening prospects of New Dealers led them to favor increased procedural restraint.

2. The Democratic Switch of 1946

By 1946, with the weakening of the New Deal coalition, the rise of the Conservative Coalition, and the reinvigoration of the Republican party, the New Dealers could no longer be assured of possessing a veto over agency or political drift by either Congress or the executive. When the New Dealers had controlled majorities in both chambers of Congress and were matched with a sympathetic administration, they had passed enabling statutes that created agencies with few procedural requirements or restrictions, which is consistent with our hypothesis just derived. Furthermore, these statutes often severely restricted the scope of judicial review, so the executive was relatively unhindered in implementing the New Deal program.¹⁰ Even after the New Deal coalition

10. See Milkis (1993) for an extended version of this thesis.

in Congress deteriorated at the end of the 1930s, President Roosevelt's veto remained a sufficiently effective tool to reject legislation that sought to establish procedural restraints on administrative agencies.

At first, Republican strength in the federal judiciary allowed them to block New Deal program implementation. Within 2 years after Roosevelt's inauguration, the courts filed over 1,600 injunctions against the enforcement of New Deal laws passed by Congress (Murphy 1962:55). After the Supreme Court surrendered constitutional ground in 1937, with Justice Robert's famous "switch in time" on *West Coast Hotel v. Parrish*, the Republicans turned to the strategy of using legislation to halt the expansion of the New Deal. Frustrated in their attempts to defeat new regulatory measures or repeal old ones, Republicans sought to hamstring regulatory agencies by imposing a series of strong procedural and judicial constraints on their actions. Republicans, and Southern Democrats as well, introduced legislation on administrative procedures that was designed to limit agency policy discretion.¹¹ None, however, were enacted into law, as New Dealers were always able to defeat measures that threatened to restrain agencies, for they favored keeping "administrative procedure firmly in the hands of the executive branch itself, and imposing only the thinnest restraints on agency Action" (Shapiro, 1988:452). So long as the New Deal Democrats enjoyed commanding majorities in congressional and presidential elections, Democratic party leaders in the legislative branch had no reason to burden agency decisions with cumbersome procedure. Democratic legislators shared the president's policy objectives and enjoyed popular political support because of the strength of the president in the electorate, but the courts remained as the only significant bastion of Republican support. Substantially increasing procedural rights in administrative procedure would only empower the Republican court to do still more damage to the New Deal.

By 1946, the political situation had changed substantially. First, the Democrats had lost their commanding majorities in the House and Senate, and Roosevelt had died and was replaced by a nationally unknown congressman from Missouri, Harry Truman. After witnessing the defeat of Churchill just 2 years earlier, and observing the weakness of their own president's leadership in the White House, the future looked rocky to the New Dealers. The Democrats faced the very real possibility that they would lose control of Congress in the 1946 election (which they did) and that the Republicans would capture the White House in the election of 1948. They perceived that such a chain of events would most likely lead to the reversal of numerous New Deal programs.¹² Furthermore, having split over the issue of civil rights in 1937, the Democrats no longer governed as a completely coherent majority party. Rather, from 1937 to the mid-1970s, they governed as a procedural coalition, where the leadership of the party and the top

11. For details, see Shepherd's (1996) excellent history of the APA, which describes the prior bills that were introduced.

12. Kiewiet and McCubbins (1991) show that the Republicans, when in control of the House and Senate, did indeed cut New Deal programs for FY 1948–49 and FY 1954–55.

committee posts in the House and Senate were split between the southern and northern factions. The substantive policy agenda advanced by the Democratic party during this period was much more limited than the Democratic agenda before or since (Cox and McCubbins, 1993).

New Dealers in Congress could no longer be assured of the permanence of a benign administration. Consequently, it was often less costly for the Democrats to forge bipartisan coalitions in Congress than it was to forge a coalition with the president (Sala, 1994). During this time, many of the most important bills to become law, such as labor, Social Security, and income tax reforms, were passed by bipartisan coalitions in the House and Senate over the objections of the President (Rohde, 1991). This is especially true for the southern Democrats when facing a New Deal Democratic president, giving rise to the so-called Conservative Coalition.

The Democrats' dilemma in 1946 was how to preserve the New Deal in light of these changed circumstances. In order to consolidate and entrench the New Deal programs, the New Dealers formed a legislative "grand coalition," based on a compromise over economic policy between the conservatives and liberals in Congress. At the heart of this deal were procedural changes that empowered the judicial branch at the expense of the executive and reserved more powers to Congress. The compromise took place on two dimensions: the Republicans achieved some of their desires on individual rights, while the northern Democrats got most of their way on economic policy.

So how did the northern Democrats achieve so much, in entrenching the New Deal program, during a period when their hold on power looked increasingly tenuous to all parties involved? We argue that the New Dealers, despite their minority status in the Conservative Coalition era, still held much of the initiative with respect to administrative reform in Congress at the time. Having witnessed the Conservative Coalition's repeated failures to enact administrative reform, it was undeniable that to pass reform the Conservative Coalition would have to compromise with either the President—to prevent his veto—or the liberal Democrats in Congress—to override any potential veto. The New Dealers packaged together provisions that gave the Conservative Coalition enough procedural due process requirements to ensure their participation, while satisfying their own interests by both empowering Congress and consolidating the New Deal programs already enacted. Thus the story can address the presence—and also the incompleteness—of procedural due process provisions in the APA.

What explains the willingness of the New Dealers to delegate to the judiciary in 1946, in sharp contrast to the divisive conflict with the Court a mere decade earlier? By 1946 the Democrats had been able both to expand the federal judiciary and to stack the judiciary with Roosevelt's appointees, such that the partisan composition of the federal courts had shifted dramatically in favor of the Democrats. Over the course of Roosevelt's presidency, ideological conflict between New Dealers and the courts diminished from the levels observed between 1932 and 1937. By 1946 Roosevelt had appointed eight of the nine Supreme Court justices and 184 of the appeals and federal district court

jurists.¹³ The newly constituted Supreme Court had a clear majority in favor of the New Deal.¹⁴

The Democrats came to favor procedural restraints on agency action for two reasons. First, the prospect that the Republicans would gain control of the presidency in the election of 1948 caused a change in the concerns of New Deal Democrats. The new concerns echoed the concerns of the conservative coalition that an absence of procedural due process in agency decision making gave the executive branch too much policy discretion. The danger was that a Republican president could use this broad discretion to undo much of New Deal regulatory policy simply by appointing anti-New Dealers to head these agencies. Since procedural restraints make it costly and politically difficult for agencies to change existing policy, the establishment of procedural due process would blunt any Republican president's ability to dismantle or shift the regulatory policies of the New Deal. Indeed, with the procedural restraints in place, the Republicans could only repeal New Deal regulatory policies if they gained control of both houses of Congress and the presidency.

Second, with a New Deal judiciary firmly entrenched, due process guarantees would provide New Deal Democrats with a measure of protection from Republican appointees who might pursue administrative repeal of the New Deal. Indeed, 35 years later, when Reagan appointees attempted rollbacks of regulations, the courts played precisely this role. The enhanced role of the courts under more formalized procedures was appealing to Democrats for the same reason that it had been appealing (but not achievable) to Republicans during the 1930s. A Republican-dominated federal judiciary would harness the New Deal; a Democrat-dominated one would be expected to favor the New Deal. In other words, just as the initial restrictions on judicial review had come about due to conflict of interest between Congress and the courts, the lifting of those restrictions in the APA was due to a liberalization of the judiciary.

With respect to the hypothesis from the previous section, overwhelming Democratic majorities in the House and Senate between 1932 and 1938 created the necessary conditions for the optimal decision of the enacting coalition to adopt minimal administrative controls for most New Deal agencies.¹⁵ While

13. As is typical after a change in partisan control, early in the New Deal, congressional Democrats vastly expanded the federal judiciary, shifting the balance of appointees from Republicans whose sympathies lay with *Lochner* to Democrats who shared the New Deal ideology. On the Supreme Court, due to the constitutional threat inhering in the large New Deal majorities after 1936, the problem of enforcing the *Lochner* philosophy on increasingly unsympathetic lower courts, and the vacancies created by the departure of Republican-appointed justices, allowed Roosevelt to shift the Court in his favor. See McNollgast (1996) and DeFigueireido and Tiller (1996).

14. This argument is a common conclusion of the spatial theory of voting. Kiewiet and McCubbins (1988), for example, use this logic to show why the president's veto threat is asymmetric. When the president prefers more than the median voter in Congress, a veto would make the president worse off and so is not credible.

15. An interesting exception is the broadcasting component of the Federal Communications Commission, which was transferred into the new FCC in 1934 from the old Federal Radio Commission, a creation of the Republicans in 1927. Hence the broadcasting sections of the Communications Act of 1934 are replete with procedural detail (Shipan 1997), a result that suggests concern about

Republicans and some southern Democrats may have preferred more procedural control,¹⁶ their support was unnecessary for passage of the New Deal agenda, so their concerns could be ignored. After 1938 the median preferences in the House and Senate moved away from New Deal ideology, although the President remained pro-New Deal. Hence even when the conservative coalition managed to form a congressional majority to adopt procedures that would have the effect of pulling agency decisions away from the outcomes desired by the New Dealers, the president could veto the legislation. By 1946 the policy preference of the president was becoming a lottery over a liberal Democrat (perhaps Truman, perhaps a substitute if Truman could be dumped in 1948) and a Republican (Dewey or Taft), either of whom would be antagonistic to the New Deal. At this point political drift for the first time became a concern for New Deal Democrats.

The opposite effect was occurring with respect to the judicial branch. Early in the New Deal, when the preferences of the president and majorities in the House and Senate were aligned, the judiciary was hostile to the New Deal. As a consequence, the enacting coalition delegated much authority to the administration and gave the judiciary few tools for influencing agency behavior. By 1946, at the point when the administration was looking less and less likely to remain in Democratic hands, Roosevelt appointees now controlled the judiciary, so that the courts were no longer hostile to the New Deal. Indeed, New Deal legislators faced the prospect that after the election of 1948, either Congress or the President would become more hostile to the New Deal than the judiciary if Republicans took control of either branch. Hence, by 1946, more extensive judicial review seemed more attractive to New Deal Democrats than allowing the administration to have relatively unrestrained influence over agency behavior.

The same phenomena that led New Deal Democrats to favor formalized procedures also must have affected the preferences of southern Democrats and Republicans. Both groups could anticipate that the weakening political position of New Deal Democrats increased the likelihood that, after the next presidential election, procedurally unfreighted New Deal agencies could be turned around by the appointees of a new President who was antagonistic to the New Deal. Hence as New Deal Democrats shifted in favor of procedural controls on agencies, why was there no offsetting shift by the members of the conservative coalition?

The common factor influencing all members of Congress was that the APA strengthened Congress at the expense of the president. If the courts enforced any significant part of the APA, the effect would be to force policy decisions to be less responsive to the president and more responsive to the interests that the APA protected. The ability to influence agency decisions through administrative procedures shifts power from the administrators of the agency (who are likely

agency drift on behalf of New Dealers.

16. Shepherd (1996) concludes from his analysis of the passage of the APA that “although conservatives indicated their grudging support for the bill, they . . . would have preferred stricter controls on agencies” (p. 1671). “Republicans refrained from offering amendments because they feared upsetting the fragile compromise that the parties had reached” (p. 1672).

to reflect the preferences of the president) to those who write the statutes (a process that is most influenced by Congress). Hence all members of Congress have this motive for writing the statute.

Likewise, all presidents have the same motive for vetoing it. In the case of the APA, President Truman's failure to veto the APA may have been due to the fact that he preferred to hard-wire the New Deal policies in the face of a possible future Republican victory, or it may have been simply in recognition of the fact that the overwhelming majority support for the APA meant that a veto was futile.

In addition to the common factor of seeking to wrest power from the executive branch, southern Democrats and Republicans had their own, different reasons to support the APA. For southern Democrats, the explanation is easier. Recalling the spatial depiction of the preferences of members of Congress during this era, the southern Democrats were not ideologically similar to Republicans. The conservative coalition was not an alliance among political leaders who shared the same vision of government. Indeed, southern Democrats shared many of the elements of the economic ideology of New Deal Democrats. To southern Democrats, the prospect of a Republican president replacing a New Deal Democrat was not something to embrace with enthusiasm. Without procedural restrictions on agencies, the change in the presidency simply would have shifted policy from near the ideal point of the New Dealers toward the equally distant ideal point of Republicans. Consequently the preferences of southern Democrats concerning administrative procedures should not have been affected by the rising political fortunes of the Republicans.

In the case of the Republicans, the weakening of the New Dealers brought forth the prospect of electing a president who, in the absence of procedural constraints, would disable the New Deal by administrative fiat. Nevertheless, the Republicans went along with tying the hands of a prospective Republican president. Whereas the reasons for their continued support of administrative reform probably were motivated in part by the normative arguments in favor of formalizing procedures, two political factors were also at work.

First, the Republicans were not assured of gaining control of the presidency. Indeed, they did not manage to elect a President who was antagonistic to the New Deal in 1948—or, as things turned out, until 1980. Obviously, whereas the New Deal was weakened in 1946, it was—and is a half-century later—far from dead. The Republicans could secure some gains in 1946 by supporting the APA. Administrative reform would slow the adoption of further New Deal regulations. In adjudication, reform would reduce the costs that New Deal agencies could impose on Republican constituencies, which would have the effect of moving policy outcomes away from the degree of economic interventionism that New Dealers preferred. Republicans would enjoy these benefits even if (as happened) the president continued to be a New Deal advocate.

Second, if the Republicans did gain control of the office of the president, they were also likely to gain control of Congress. In fact, they briefly did control both the House and the Senate twice after 1946: 1947–1948, and 1953–1954. In either period, had a Republican who was antagonistic to the New

Deal been president rather than Harry Truman in the earlier period or Dwight Eisenhower in the later one, Republicans could have undone the New Deal by statutory repeal. Voting for the APA did not preclude voting for more substantial changes later on.

In short, by voting for the APA the Republicans sacrificed the prospect of a de facto repeal of the New Deal through the election of a Republican president in 1948. As history developed, this was not a sacrifice at all, but in 1946 certainly this possibility was real enough to be perceived by Republicans as a substantial disadvantage. The other benefits of the APA to the Republicans remained as they were in 1940 and before when they had sought similar reforms. Specifically, the APA would slow and constrain future New Deal presidents and would afford some protections on the adjudication front. Of course, no one can prove that these benefits of the APA outweighed the costs to Republicans, but certainly the Republicans still had some good reasons to support the act—reasons that did lead them to support it, and retrospectively that proved to justify this decision.

The significance of the argument in this section is that it answers an unresolved puzzle in the history of the passage of the APA: why a measure that apparently enjoyed overwhelming support in 1946 took so long to pass, assuming *arguendo* that the main purpose of the act was to obtain certain normative objectives with respect to the protection of individual rights. The solution lies in the politics of the New Deal era. If procedural safeguards have policy consequences that go beyond their direct consequences with respect to protecting individual rights, procedural reform affects not only rights but other policy outcomes. Politics is, of course, about both the protection of rights and other policy outcomes. Procedural reform did not occur during the period when New Deal Democrats controlled all branches of government because they saw no need for it. The president's appointees were not making policy decisions that their congressional compatriots found undesirable. Procedural reform did not occur after New Dealers lost control of Congress because an important veto position—the president—was occupied by a New Deal Democrat, who did not want to cede policy influence to the conservative coalition. Procedural reform did occur in 1946 because the New Deal Democrats could no longer rely on maintaining a New Deal Democrat in the White House, and so preferred similar administrative constraints to the ones that the conservative coalition had advocated years earlier.

3. From Walter–Logan to APA

The goal of this section is to compare the two most monumental efforts at administrative reform during this late New Deal period. One effort, the Walter–Logan bill, failed by veto after passing Congress without the support of New Deal Democrats; the other effort, the APA, succeeded with their support.

Almost immediately after the first 100 days of the Roosevelt administration, opponents of the New Deal had begun to pursue procedural and substantive means of undermining agency policy making. In 1933 the American Bar Association (ABA) created the Special Committee on Administrative Law, which presented its first formal report and criticism of New Deal procedures and pol-

icy making the next year. By the late 1930s, the Special Committee, led by an articulate New Deal opponent, Roscoe Pound, began making detailed procedural recommendations. These provisions were embodied in “An Act to Provide for a More Expeditious Settlement of Disputes with the United States,” later known as the Walter–Logan bill. The 1938 ABA report sought creation of a new United States Court of Appeals for Administration “to receive, decide, and expedite appeals from federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest, and for other purposes” (ABA, 1938). The idea was to give the new court authority to evaluate agency rulings, including the power to issue declaratory determinations. A means of preventative justice, these determinations would expedite concerns before agencies by granting relief for individuals and firms affected by agency decisions.

The 1938 report criticized “ten tendencies” of administrative officials, including to decide without a hearing, or without hearing one of the parties; to decide on the basis of matters not before the tribunal or on evidence not produced (e.g., to act on secret reports of inspectors); to make decisions on the basis of preformed opinions and prejudices; to disregard jurisdictional limits and seek to extend the sphere of administrative action beyond the jurisdiction confided to the administrative board or commission; to extend the regulatory power of the administrative agency; to arbitrary rule making for administrative convenience at the expense of important interests; to mix rule making, investigation, and prosecution, or the advocate’s function, the judge’s function, and the function of enforcing the judgment. In the ABA’s view, New Deal agencies were acting without considered judgment, without due process, without sufficient consideration of the issues, and without granting parties the right to be heard or procedures for relief.

New Deal critics sought remedies in the form of procedures that would grant individuals and firms greater rights within the regulatory process, greater access to the courts for judicial review, and stronger tools for the judiciary to review and intervene in agency procedures. They also sought to standardize procedures for agencies—at least, for those created after 1933. During the period leading up to the Walter–Logan bill, nine administrative procedure bills were introduced in Congress, most of which never received a hearing, and none of which passed (Shepherd, 1996). Proponents of the Walter–Logan bill, however, were able to assemble majorities in both chambers to pass the bill and send it to President Roosevelt, who subsequently vetoed the legislation.

The provisions of the Walter–Logan Act were as follows. By far the dominant purpose of the act was to strengthen individual rights and judicial review. Indeed, the bulk of the act, including the three largest sections (3–5) focused on judicial review. Section 2 sought to repeal recent agency rulings. “Rules now in existence (other than those in effect over 3 years) must, under the bill, be reconsidered after a public hearing if, within a year after the bill becomes a law, any person substantially interested in the effects of the rule so requests.” Section 3 provided for a new sweeping grant of jurisdiction to the United States Court of Appeals for the District of Columbia to review agency rules. The

bill also imposed an evidentiary standard of substantial evidence, attempting to limit an agency's ability to act on its whims and without sufficient record. Also of importance is the bills list of exemptions in Section 7, which included nearly all agencies created before 1933 under Republican administrations and thus more likely to be serving interests favored by Republicans.¹⁷

New Deal proponents did not ignore the issue of procedure, though they sought to delay dealing with them. In 1939, as the Walter–Logan bill moved through Congress toward passage, President Roosevelt set up his own committee to study the problem. He asked Attorney General Murphy to appoint a committee to undertake a particularized examination of administrative function and to investigate the need for procedural reform. One legal scholar who was present during those debates later characterized this committee as the first intensive and extensive inquiry into the methods of federal agencies, thereby implicitly criticizing the ABA's investigation and report (Gellhorn, 1986).

The Attorney General's report made a series of recommendations. First, it proposed the creation of a new office with power to appoint and remove hearing commissioners. Second, the report endorsed publication of agency rules, policies and interpretations, including the dates at which agency rules went into effect. Third, the report recommended using hearing commissioners in adjudicatory proceedings.

The Walter–Logan bill moved through Congress in 1940, passing the House on April 18 and the Senate on November 26. The House concurred with the Senate amendments on December 2, sending the legislation to Roosevelt. The President vetoed the bill on December 17, citing among other reasons that the bill was designed largely to benefit lawyers, that Congress had acted before the Attorney General's report was completed, and that the bill gave insufficient exemption to defense agencies.¹⁸

No legislation was introduced during 1942 or 1943, but Congress again considered administrative reform during 1944 and 1945, when seven bills, including the one that eventually became the APA, were introduced in Congress (Shepherd, 1996). Congress passed the APA in early 1946 (with the Senate approving in February, and the House in May) and President Truman signed the legislation in June. The act provided for the following. (1) It required agencies to publish in the *Federal Register* a description of their organization and rule-making procedures and to hold hearings or provide means of public comment on proposed rules. (2) It prescribed standards and procedures for

17. The agencies not covered by Walter–Logan included the military (as did the APA), Federal Reserve Board, Federal Deposit Insurance Corporation, Federal Trade Commission, Interstate Commerce Commission, Comptroller of the Currency, Civil Service Commission, Departments of Justice and State, National Mediation Board, National Railroad Adjustment Board, Railroad Retirement Board, all federal lending agencies, and “any matter concerning . . . longshoremen and harbors workers' laws.”

18. With respect to lawyers, Roosevelt said in his veto message, “The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation” (Roosevelt, 1940:3).

agency adjudication, including licensing and injunctive orders. Among the requirements were adequate notice to parties concerned, separation of prosecution and decision functions by prohibiting investigatory or prosecuting officials from deciding cases, and granting some discretionary authority for agencies to issue declaratory rulings. (3) It spelled out hearing procedures, including the requirements that proponents of rules should have burden of proof and that no decision could be made except as supported by “relevant, reliable and probative evidence.” (4) It provided that any person suffering legal wrong because of any agency action be entitled to judicial review except where statutes precluded review or where agency action was by law committed to agency discretion, but required the aggrieved party to exhaust administrative remedies first. (5) It directed each agency to appoint competent examiners to act as hearing officers and to make or recommend decisions.

Shapiro (1988) provides the following overview of the political struggle underlying the APA. According to Shapiro, the APA as originally enacted divided administrative law into three parts. These correspond not only to different types of procedures, but types of processes desired by different of politicians.

First, “for matters requiring adjudication, in which government action was directly detrimental to the specific legal interests of particular parties, the compromise was heavily weighted in favor of the conservatives. The demand for totally separate tribunals was ignored . . . but the agencies’ processes were to be considered quasi-adjudication and were to be governed by adjudicative-style procedures, presided over by relatively strict judicial review” (Shapiro, 1988: 45). Second, rule-making constituted an almost total victory for the liberal New Deal forces. No adjudicatory-style hearings were required; no records on rule-making would have to be generated for possible review; and the standard of review made an agency’s decisions irreversible unless it had acted arbitrarily or irrationally. Third, for everything the government did that was neither adjudication nor rule making, no procedures were prescribed.

The comparison between the approach to administrative procedures in the Walter–Logan bill and the APA is instructive. The Walter–Logan bill gave the courts new powers to forestall agency action, while the APA did not. The APA was stronger on provisions requiring transparency and openness. The APA covered nearly all nondefense agencies, while Walter–Logan sought to cover only New Deal agencies.

In assessing the political implications of the APA, the first observation is that its provisions are designed to complement other means of intervention by political officials. They are not designed to work solely on their own. Fire alarms provide one of the principal mechanisms by which members of Congress help police agency actions. As McCubbins and Schwartz (1984) argue, members of Congress cannot hope to follow what is going on in every agency, let alone whether each decision by each regulatory agency conforms to the interests of their constituents. Were direct knowledge of each decision required, influence by members of Congress would be hopeless. Instead, members of Congress off-load this task onto their constituents who have sufficient incentive to follow

agency proceedings in detail. When something goes awry, constituents pull the fire alarm, bringing the attention of political officials down on agency proceedings. To the extent that sustained congressional attention is costly to an agency, it will seek to avoid attention by serving congressional constituents so that alarms do not get pulled.

Nevertheless, if agencies can keep their actions secret, especially if they can conspire with particular interests against others, congressional interests might not know about agency proceedings until it is too late. Agencies could secretly collude for support by another constituency—agency drift—presenting members of Congress with a *fait accompli* that cannot be reversed if an ally of the favored constituency is a veto player. The APA helps mitigate this problem by requiring a substantial degree of openness and transparency. Agency organization and responsibility must be announced in advance. Agency procedure must be set in advance. Affected constituents must be notified in advance of proceedings and given opportunities to participate and provide their views. Advance notification helps prevent the agency from conspiring in secret with other interests. The APA also enlists the courts to enforce many of these provisions, lowering the costs to political officials and their constituents. Courts are directed to set aside agency rulings if an agency fails to follow its procedure. A policy *fait accompli* is not possible.

The APA greatly enhances the efficacy of congressional sanctions. The fire alarm mechanism requires that constituents know what the agency is planning to do. Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituent groups and an agency. To undertake this function, elected officials must have ready access to relevant information: what are the issues actually at stake in the decision, who are the aggrieved parties, and what are the likely consequences of pending policy decisions? The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.

A further political implication of these rules concerns executive dominance of agencies. In the 1930s, agencies faced no uniform standard regarding how decisions were made and who was consulted before making them. Harry Hopkins, head of the Federal Emergency Relief Administration in the early New Deal era, refused to disclose to Congress how he made his decisions and the criteria he used to allocate funds.¹⁹ This behavior prevents Congress from knowing what is going on, thus preventing it from intervening to get a more desirable outcome. Harmony of interest among congressional New Dealers and the President allowed Hopkins and other political officials to sustain this type of behavior and thus discretion. After the war, with the possibility of a Republican president and Republican appointees to all the New Deal agencies, New Dealers sought to limit this type of executive control. The APA's information provision prevented this type of secret agency deliberation.

19. Wallis (1991) summarizes the issues surrounding FERA.

Next, consider the APA's requirement of substantial evidence. This provision prevents the worst forms of abuse—agencies that make decisions without any attempt to assemble evidence to support their policy decisions. In addition, it preserves some discretion greater than that allowed under stronger evidentiary standards, notably the preponderance of evidence. Substantial evidence does not imply that, on balance, the evidence supports the agency. Rather, it requires that a reasonable person could conclude that the decision was justified.

The APA's requirements about judicial review also have political ramifications. Section 10(E) requires courts

to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action. They must compel action unlawfully withheld or unreasonably delayed. They must hold unlawful any action, findings, or conclusions found to be, first, arbitrary or an abuse of discretion; second contrary to the Constitution; third, in violation of statutes or statutory right; fourth, without observance of procedure required by law; fifth, unsupported by substantial evidence in any case reviewed upon the record of an agency hearing provided by statute; or, sixth, unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as any party may cite, and due account must be taken of the rule of prejudicial error.

With respect to the list in the long second to last sentence, the act grants the courts the power to define arbitrary decisions and an abuse of power, including acting without notice, without adequate participation, without adequate evidence, and so on. Then courts, not agencies, are the locus of both constitutional and statutory interpretation. This has an important implication for New Dealers in 1946. By granting authority to the (New Deal dominated) courts to interpret agency statutes, it prevents the new (Republican dominated) agency officials from altering policy by announcing a new interpretation of the statute. Moreover, courts, not agencies, determine whether agency actions violate other legislation or citizen rights. Finally, courts determine whether agency decisions are unwarranted by the facts.

As legal scholars observe, these provisions all have natural interpretations in the moral theory underpinning due process and the rule of law, which undoubtedly was part of the motivation for these provisions, particularly the perception that many agency decisions were arbitrary.²⁰ But a view that ignores the politics underlying the enactment of the APA leaves two puzzles: why did it take so long to enact these noble provisions, and why did the legislation implement these philosophical principles in the APA form rather than the form proposed by the ABA, the Walter–Logan bill, or the Attorney General's report? Our

20. See the "ten tendencies" of agencies according to the ABA (1938).

theory provides a framework for answering these questions. The form taken by administrative procedures has important political effects for the immediate postwar environment and the Democrat's dilemma of 1946. First, these procedures limit some of the most egregious abuses of discretion under the New Deal, thus granting something to southern Democrats. Second, they helped limit the ability of new Republican regulatory officials from perverting New Deal legislation should the Republicans capture the presidency. Short of united Republican control, which would allow Republicans to repeal the New Deal by legislation, Democrats could forestall immediate demise of the New Deal.

Were the Republicans to capture the presidency but not both houses of Congress, Republican regulatory agency officials would face two formidable barriers to administrative emasculation of the New Deal. First, the courts—largely New Dealers after the long FDR presidency—had the power to prevent agency decisions that subverted New Deal policies if these decisions lacked an evidentiary basis or were inconsistent with the agency's statutory mandate. Second, agencies that followed prescribed procedure to dismantle a New Deal policy would have to announce their intentions in advance, allow New Deal constituents the opportunity to participate in the decision, and enable a Democratically controlled legislative branch to take sanctioning actions (such as refusing to appropriate funds) before the deed was done.

We now turn to model the compromise that gave rise to the APA. This model will allow us to show the Democrats' dilemma in 1946, and how their uncertainty over future electoral outcomes created the foundations for the compromise. We will also derive testable propositions from this model that we test in Section 4.

3.1 A Spatial Model of the Democrats' Switch of 1946

Members of Congress divided into three relatively coherent voting blocks at the end of the 1930s: northern Democrats, southern Democrats, and Republicans. Scaling techniques suggest that congressional voting from 1938 until the early 1970s can be characterized using two political dimensions (Poole and Rosenthal, 1995). According to Poole and Rosenthal, the first or horizontal dimension corresponds to a left-right continuum over economic policy making, with preferences for greater economic intervention by the national government on the left, for less intervention on the right. The second or vertical dimension corresponds roughly to political and civil rights, which are closely related to regional issues. As the descriptions suggest, these are the two principal congressional issues dividing the major coalitions.

To understand congressional voting, we employ a two-dimensional spatial model. We plot the three main coalitions along the two dimensions in Figure 1. In order to conform with Poole and Rosenthal's empirical analyses, higher levels on the vertical axis reflect preferences for weaker political and civil rights.

We locate the ideal policy of the typical northern Democrat (ND) in the lower left, corresponding to a preference favoring federal economic intervention and a high degree of protection for political and civil rights. The typical southern Democrat (SD) is located in the upper left, a bit to the right from the northern

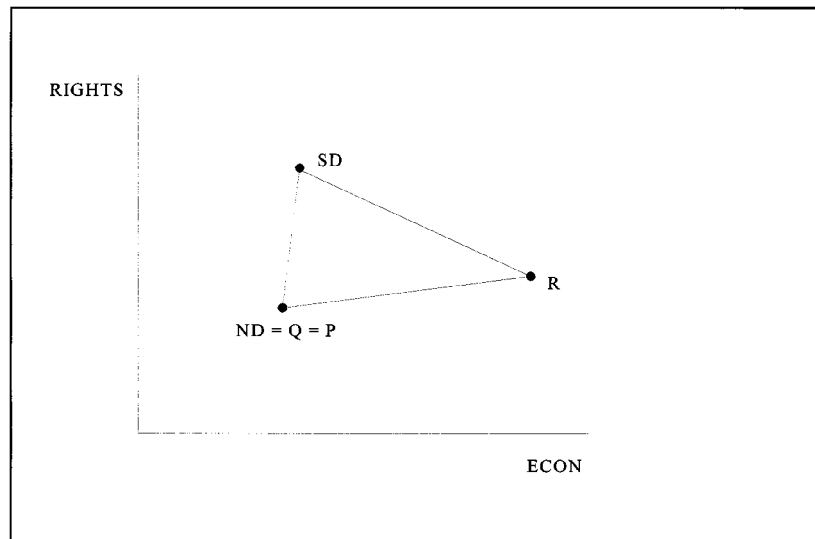


Figure 1. Coalition preferences and the status quo, 1938–1946.

partisans on the economic dimension, preferring nearly as large a federal presence in the economy, but with a considerably lower preference for political and civil rights. The typical Republican (R) is located on the lower right, preferring far lower levels of federal economic intervention but nearly as high a level of protection for political and civil rights as northern Democrats.

In Figure 1, we also plot the Pareto set, the set of policy alternatives for which one group can be made better off only by making one or both of the others worse off. The Pareto set corresponds to the triangle connecting the ideal points of the three groups. We represent President Roosevelt's ideal policy as P . The status quo policy, Q , during the late New Deal represents the policies enacted by the New Deal Democrats over the first two Roosevelt administrations. For simplicity, we set $ND = P = Q$.²¹

Within this spatial model, we can represent the impact of administrative procedure rather simply. Figure 2 depicts the same political configuration as Figure 1. The circle centered at the status quo represents the degree of administrative discretion afforded executive agencies under the administrative procedure in place in the 1930s. Agency discretion allows agencies to move policy anywhere within this region. Given the configuration of preferences in Figure 2, agency policy remains at Q . Strong executive influence combined with appointments by Roosevelt ensured that agency administrators would be sympathetic to the New Deal. Sympathetic administrators would employ their discretion to implement and sustain New Deal policies at Q .

21. These policies could all be located at different policy alternatives in the neighborhood of ND without changing any of the results that follow.

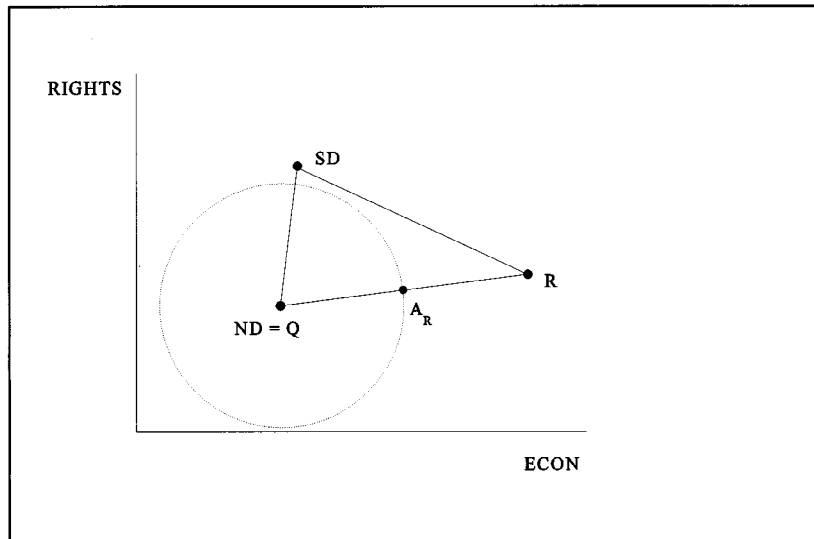


Figure 2. Agency discretion prior to the APA.

As long as the New Dealers retained united political control of the presidency and Congress, they preferred a high degree of agency discretion. United political control allowed them the tool to influence agency administrators and agency decisions. Significant agency discretion thus allowed New Dealers the flexibility to impose new policies at a relatively low cost. Consistent with this, throughout the 1930s and the war years, New Dealers opposed all attempts at administrative procedure reform.

In a period of electoral uncertainty and coalitional politics, however, the high degree of discretion became a political liability for New Dealers: high administrative discretion lowers the cost to the opposition of altering policy. Suppose, for example, that the Republicans captured the presidency while the Democrats retained control of Congress. The high degree of agency discretion would allow the Republicans to make significant unilateral alterations in policy. Although the Democratic Congress might attempt to pass legislation to force the agency to conform to the previous policy status quo, the Republican president could always veto it. In particular, a Republican president facing a Democratic Congress and status quo Q could move policy to the alternative A_R . This alternative represents the maximum policy change afforded the executive, given its preferences and the degree of agency discretion. Of course, if the Republicans captured united government, they could pass legislation reversing the New Deal. As long as the Democrats retained at least one house of Congress, they could veto Republican legislative attempts to reverse the New Deal.

In the context of electoral uncertainty, New Deal Democrats valued the APA's reduction in the degree of agency discretion. We show the impact of these procedures in Figure 3, which represents the degree of agency discretion under

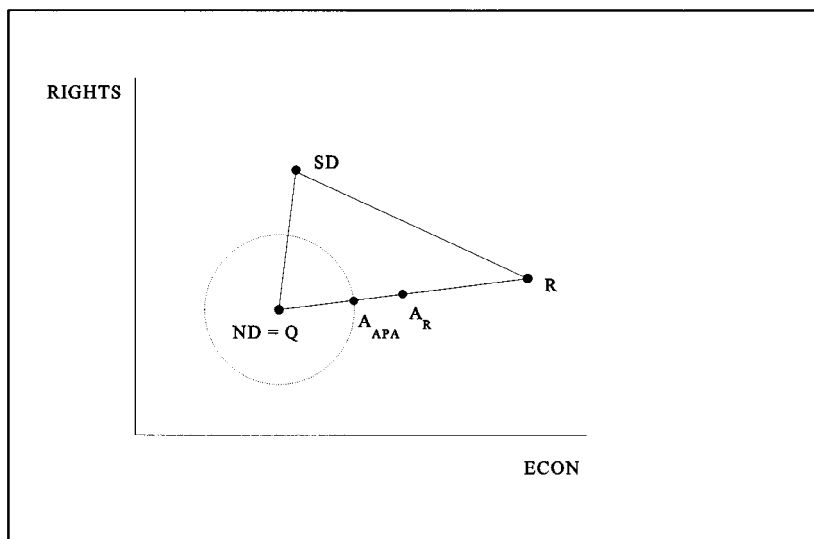


Figure 3. Agency discretion under the APA.

the APA as a smaller circle around the status quo. In the case of a Republican president facing a Democratic Congress, the new President could unilaterally move policy to A_{APA} . The policy change under the APA (from Q to A_{APA}) is smaller than that without the change (from Q to A_R).

In sum, the APA's restrictions would be costly to the New Dealers under sustained united political control of the national government. In the face of electoral uncertainty over the presidency, however, New Dealers would value the APA's restrictions because they help preserve New Deal policies.

The above argument focuses on the political impact of the APA relative to the status quo. The discussion in Sections 2 and 3 emphasizes that the APA was the culmination of the result of a decade-long political battle over different approaches to administrative procedure. The Walter–Logan bill attempted to impose much stronger tools for individuals affected by legislation to prevent new regulations. In the late 1930s, the Walter–Logan bill became a legislative centerpiece of the conservative coalition of southern Democrats and Republicans.

The policy embodied in the Walter–Logan bill is shown as the alternative WL in Figure 4. We locate WL on the line segment connecting S and R because this represents the maximal change from Q that makes both coalition partners better off. Any point off the line toward Q would leave policy benefits untapped, while any further away from Q would make both SD and R worse off.

Figure 4 can be used to predict the pattern of voting by members of Congress when WL is pitted against Q. Standard assumptions about preferences allow us to draw a “cutting line” that divides those members voting yes from those voting no. Given our assumptions about preferences, the cutting line is the perpendicular bisector of the segment connecting WL and Q. In the figure, all

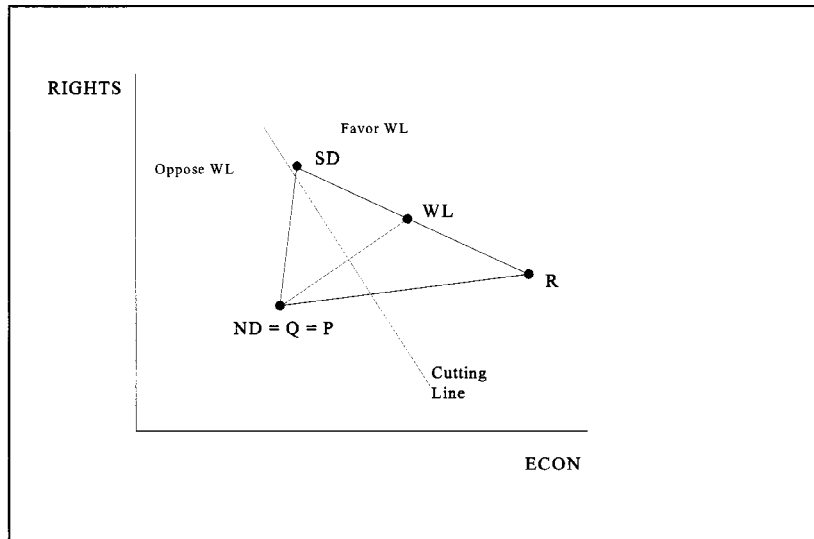


Figure 4. Voting on the Walter-Logan bill.

members of Congress upward and to the right of the line vote in favor of WL, all below and to the left of the line vote in favor of Q. We test this prediction in the next section using logit analysis of the vote on the Walter-Logan bill.

Another prediction concerns the role of preferences over the New Deal in voting over administrative procedures. In our model, the cutting line separating voters favoring WL from voters favoring Q reflects a mix of preferences over both economic intervention and political and civil rights, not just political and civil rights. That is, the cutting line slopes downward to the right. Were the APA solely about political and civil rights, the cutting line would be horizontal, separating voters higher on the vertical dimension from those lower on this dimension. Were the APA solely about economic policy, the cutting line would be vertical, separating voters favoring economic intervention from those opposing it.

Our interpretation suggests that the APA was designed in part to provide for procedural due process and in part to protect the New Deal. This hypothesis implies that, holding constant for other factors, we should observe a cutting line as shown in Figure 4—at an angle, falling to the right. A falling cutting line has two implications. First, higher preferences for economic intervention should make a member more likely to vote for Q over WL. Second, lower preferences for political and civil rights should imply members are more likely to favor WL over Q. The slope of the cutting line provides information about the relative importance of the two factors in the 1930s. The steeper the slope, the more important the economic dimension.

A final implication of the model concerns voting on the APA. Standard wisdom about the APA holds that the unanimous support and lack of alternative proposals reflect a consensus over administrative procedure and, further, that

this act was therefore above politics. Northern Democrats were the principal opponents of administrative procedures during the late 1930s. As the Walter–Logan bill reveals, southern Democrats and Republicans sought significant procedural and judicial protection of economic rights. After World War II, New Dealers sought to impose a more modest form of administrative procedures. Although the APA emphasized procedural due process over economic rights, it did impose some new constraints on agencies desired by those favoring the Walter–Logan bill; for example, the substantial evidentiary requirement, some of the reporting requirements, and the increased availability of judicial review. The APA, therefore, moved administrative procedures in the direction sought by opponents of the New Deal. The model thus predicts that all three groups would support the APA, as occurred.

A grand coalition emerged in support of the APA, but not because everyone agreed that this was the best form of procedures. The supporters of the Walter–Logan bill wanted a much larger move than that represented by the APA. According to Shepherd (1996:1670–1671):

Although conservatives indicated their grudging support for the bill, they noted that they would have preferred stricter controls on agencies. Indeed, most all of the Republicans had earlier voted for the strict Walter–Logan bill. However, the administration would agree to no stricter bill than the negotiated compromise. . . . Republicans emphasized that they would both support the bill and propose no amendments to it, but not because they adored the bill. Instead, Republicans feared upsetting the fragile compromise that the parties had reached. Conservatives' demands for stricter reform over more than a decade had failed completely. Although flawed, the bill was better than nothing.

But the grand coalition formed in support of the APA because that bill altered the status quo in the direction preferred by everyone, even members of the conservative coalition.

4. An Empirical Investigation of the Premises

Our argument about the political foundations of the APA hinges on the assumption that there was more to the consideration of the act than just a debate over individual rights and procedural due process. Rather, we have assumed that the act also embodied a policy debate, and that a grand coalition, between the northern and southern Democrats and the Republicans, agreed to a compromise on two important dimensions: economic policy and civil rights. This premise stands in stark contrast to the most widely accepted explanation about the origins of the APA as the embodiment of a unanimous desire among members of Congress to enhance administrative efficiency and to extend individual rights through the establishment of procedural due process for federal agencies (Gellhorn, 1986).

An important implication of our premise is that, if we analyze the votes of members of Congress on procedural measures such as the APA or the Walter–

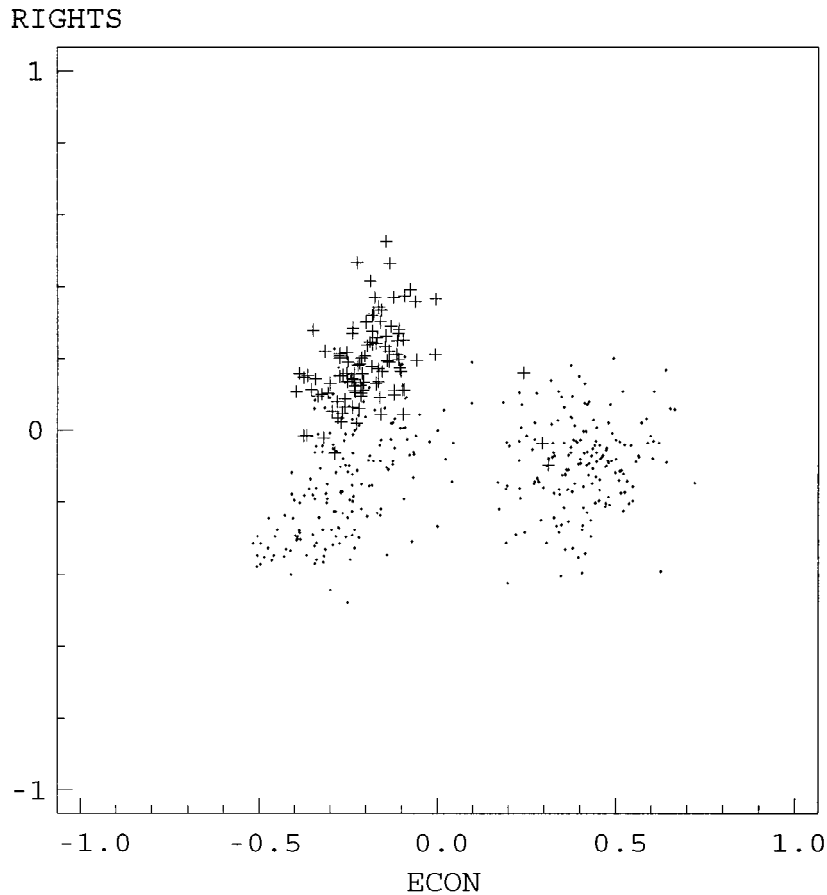


Figure 5. Poole–Rosenthal scores for members of congress, 1940 (+ indicates southerners).

Logan bill, then we would discover that our two dimensions each explain a significant amount of the variance in individual votes. Unfortunately there was no recorded vote on the APA. But, several recorded votes were taken with respect to the Walter–Logan bill. If, as we have assumed, the dimensions underlying the debate over the Walter–Logan bill are the same as the dimensions underlying the APA, then our analysis of the votes on the Walter–Logan bill provides a test of our thesis.

Figure 5 plots the Poole–Rosenthal NOMINATE scores for each member of the House of Representatives in 1940. Poole and Rosenthal created a scale for roll call votes on the basis of examining the voting records of each member of Congress in each session, having developed a method that allowed them to identify the dimensions underlying members' roll call votes. Their scores characterize the voting record of each member of Congress along several di-

Table 1. Size of Coalitions, 1940 and 1946

	Number	ECON	RIGHTS
1940			
Northern Democrats	162	-.27	-.14
Southern Democrats	103	-.20	.19
Republicans	174	.40	-.10
1946			
Northern Democrats	126		
Southern Democrats	127		
Republicans	184		

mensions, the most important of which are the two dimensions that correspond to economic ideology (left favoring government intervention, right opposing) and political and civil rights. Each symbol (\cdot and $+$) in the figure represents the position of a member of Congress, as derived from their roll call votes. The Republicans are clustered on the right, in the “cloud” of points that moves upward and to the right. The other two clusters are the Democrats, with southern members being highlighted by “+” symbols.

As can be seen from the figure, northern Democrats are, on average, furthest to the left on the economic dimension, southern Democrats are somewhat to the right of their northern partisans, and Republicans are, on average, furthest to the right. The figure indicates that, on average, members of each of these three groups voted more like one another than like members of the other groups (see Poole and Rosenthal, 1997). Although there is some overlap between northern Democrats and southern Democrats, on average the two types of Democrats did have quite different voting scores.

Table 1 gives a breakdown of average score by party and region.²² The table reveals that the three groups were roughly similar in size in the following sense: any two groups could form a majority. Moreover, the average PR scores for 1940 differ in precisely the way we assumed: northern and southern Democrats are reasonably alike on the economic policy (ECON) dimension, while both are very different from the Republicans. On the civil rights (RIGHTS) dimension, on the other hand, northern Democrats differ considerably from southern Democrats, while the Republicans are much closer to northern Democrats than they are, on average, to southern Democrats. The roll call voting scales produced by Poole and Rosenthal thus concur with historical accounts and with our description of the political situation during the period, as one consisting of three blocks of relatively coherent voters.

Finally, we note that the Poole–Rosenthal scores for the 1946 Congress had precisely the same form as that for the 1940 Congress. Thus the political alignment of the three groups of members of Congress remained roughly the same.

22. The figures do not add up to 435 because the tables do not include members with other party affiliations.

Table 2.

Roll Call	All Voters, pro – con (paired: yes – no) (announced: yes – no)	Northern Democrats, pro – con	Southern Democrats, pro – con	Republicans, pro – con
a. House Votes in the 76th Congress on Walter–Logan Act (H.R. 6324)				
#131 (to recommit)	271 – 106 ^a (8 – 8) (0 – 0)	42 – 76 ^a	75 – 26 ^a	152 – 2 ^a
#132 (to pass)	282 – 96 (8 – 8) (0 – 0)	45 – 71	84 – 21	151 – 2
#226 (to concur in Senate Amendments)	176 – 51 (53 – 53) (0 – 0)	18 – 45	45 – 6	112 – 0
#227 (to override veto)	153 – 127 (56 – 28) (0 – 0)	12 – 93	27 – 30	114 – 2
b. Senate Votes in 76th Congress on Walter–Logan Act (H.R. 6324)				
Senate #264 (to consider)	34 – 21 (5 – 5) (7 – 0)	10 – 8	5 – 13	18 – 0
Senate #265 (to pass)	27 – 25 (7 – 7) (6 – 0)	6 – 13	4 – 12	16 – 0

^a In the vote to recommit, pro is defined as supporting H.R. 6324 (i.e., voting against the recommittal motion).

5. Analysis of the Vote on the Walter–Logan Bill

Six roll call votes were taken on the Walter–Logan bill, H.R. 6324; four in the House in 1940 and two in the Senate. These votes are identified and described in Table 2. The first two House votes (on a motion to recommit the bill to the Judiciary Committee and on final passage) were taken on April 18. Both Senate votes were taken on November 25. These were votes first to consider and second to pass H.R. 6324. The next vote was in the House on December 2 to determine whether the House would concur with the Senate’s amendments. The final vote, also in the House, was a failed attempt to override President Roosevelt’s veto of H.R. 6324, on December 18.

In the House, only about one-third of the northern Democrats who voted supported the Walter–Logan bill on any of the votes. Roughly three-fourths of the southern Democrats who voted cast their votes in favor of the bill, while all but two of the Republicans who voted favored it. This breakdown suggests that the Walter–Logan bill was passed by a coalition of southern Democrats and Republicans over the opposition of New Deal Democrats. The breakdown of the vote to override Roosevelt’s veto shows that the northern Democrats were able to keep the southern Democrats and Republicans from successfully overriding the veto: 93 of 105 northern Democrats voted against the override,

Table 3. Breakdown of Support on Walter–Logan Votes in the House

Support Score	All Democrats	Southern Democrats	Northern Democrats	Republicans
0.00	44.98% (<i>n</i> = 112)	18.92% (<i>n</i> = 21)	76% (<i>n</i> = 38)	1.78% (<i>n</i> = 3)
0.25	1.20 (3)	0.90 (1)	2.00 (1)	0.59 (1)
0.33	1.20 (3)	1.80 (2)	0 (0)	0 (0)
0.5	6.43 (16)	5.41 (6)	6.00 (3)	0 (0)
0.67	6.02 (15)	5.41 (6)	2.00 (1)	0.59 (1)
0.75	4.02 (10)	7.21 (8)	0 (0)	1.18 (2)
1.00	36.14 (90)	60.36 (67)	12.00 (0)	95.86 (162)

and the northern Democrats provided nearly three-fourths of the votes against the override.

The coalitions in the Senate were similar, but the dividing lines were not as clear. While no Republican senator voted against the Walter–Logan bill, most Democrats, both northern and southern, opposed the bill. The bill passed the Senate as a consequence of abstentions by a large number of Democrats. On the final Senate vote, 27 of the 46 northern Democrats abstained, as did 11 of 27 southern Democrats and 11 of 27 Republicans.

From the four House votes listed in Table 2, we constructed a Walter–Logan support score for each member. On each of the votes, a member was coded as supporting the Walter–Logan bill if he or she voted in favor of passage, against recommitment, or in favor of a veto override. Because we are interested in understanding who favored the Walter–Logan bill, we also coded members as supporting the bill if they paired or announced “yes” (or “no” in the case of a recommitment vote). That is, we coded them as voting “pro” if they recorded pairing off against another member (or two members in the case of a veto override) who was opposed to the measure, even though they did not record a “yes” vote. Opposition to the bill was coded for those who voted, paired, or announced against the bill. We derived our index by dividing the total number of times a member supported the Walter–Logan bill by the total number of votes or pairings by the member. The index thus ranges from zero to one.

A breakdown by party, region, and support is given for the House in Table 3 and for the Senate in Table 4. For the House, we again see that 76% of the northern Democrats had a support score for the Walter–Logan bill of zero, while more than 60% of the southern Democrats and almost 96% of the Republicans had support scores of one.

The Senate was a bit more complicated. While over 45% of the southern Democrats gave some support to the Walter–Logan bill in the upper chamber, only 12% of the northern Democrats did so. Still, more than half of the southern Democrats (13) had a support score of zero. Meanwhile, all 25 Republicans in the Senate who voted, paired, or announced on the bill had support scores of one. The fight over Walter–Logan in the Senate seemed much more partisan, with only some of the coalitional tones of the House.

To test our hypothesis that economic policy, not just a concern over rights and fairness, affected voting decisions about the Walter–Logan bill (and hence

Table 4. Breakdown of Support on Walter–Logan Votes in the Senate

Support Score	All Democrats	Southern Democrats	Northern Democrats	Republicans
0.0	56.86% (<i>n</i> = 29)	54.17% (<i>n</i> = 13)	87.50% (<i>n</i> = 7)	0% (<i>n</i> = 0)
0.5	9.80 (5)	8.33 (2)	0 (0)	0 (0)
1.0	33.33 (17)	37.50 (9)	12.50 (1)	100 (25)

the Administrative Procedure Act), we turn now to explaining the variance in support for the Walter–Logan bill in the House and Senate. In explaining support for the Walter–Logan bill, we include as independent variables the first two dimensions of Poole and Rosenthal’s ideological scalings of members’ of Congress. Their first dimension corresponds to economic ideology, while the second corresponds to a measure of support for political and civil rights (Poole and Rosenthal, 1985, 1997). We label these two variables as Economic Policy and Civil Rights, respectively, in the tables that follow.

In explaining voting in the House and Senate, we know that, irrespective of ideology, party identification can affect an individual’s vote. The majority and minority parties in the House and Senate can impose some discipline on their members in a variety of ways. They can bribe, threaten, and cajole them into switching their votes or into abstaining. Party leaders can also affect the agenda, the number and variety of amendments considered for a bill, and the rules by which bills are considered. These actions may also affect an individual’s vote (Kiewiet and McCubbins, 1991; Rohde, 1991; Cox and McCubbins, 1993). Thus we also include party identification as an independent variable. The dummy variable, Democrat, is included in our regression as an explanatory variable.

Lastly, as many scholars have recognized, there was essentially a three-party system in the U.S. Congress from 1937 to 1974 (Rohde, 1991; Cox and McCubbins, 1993; Poole and Rosenthal, 1997). The northern and southern Democrats, while sharing a core set of policy beliefs, differed on issues such as political and civil rights. As a result, while the southern Democrats usually coalesced with northern Democrats to form a Democratic majority, some times they split from their Democratic colleagues to join forces with the Republicans to pass major legislation (see, e.g., Sala, 1994). Thus it is useful as an explanatory variable for the period to include a dummy variable for the Southerners in both chambers. This is captured by the dummy variable, South, in our regressions.

To ascertain the sources of support for the Walter–Logan bill in both the House and Senate, we regress the Walter–Logan support score against four independent variables: Economic Policy, Civil Rights, Democrat, and South. Excluding any of these variables would likely lead to inefficiency or bias in our results. We estimated the coefficients in our regression using probit analysis with robust standard errors.

Table 5 presents the results of three regressions. In the first, which includes all House members, the coefficients for Democrat and South are both significant. The second column presents a similar probit for just House Democrats. The

Table 5. Explaining Support for the Walter–Logan Bill in the House and Senate

Variable	House Votes, All Members	House Votes, Democrats	Senate Votes, Democrats
Constant	0.708 (2.225)^a	1.655 (5.296)	2.400 (3.157)
Economic Policy	7.798 (7.387)	7.310 (6.288)	8.277 (4.639)
Civil Rights	1.146 (1.813)	1.171 (1.800)	0.997 (0.780)
Democrat	1.067 (2.163)	—	—
Southern	0.752 (2.977)	0.748 (2.953)	0.146 (0.285)
<i>n</i>	418	249	51
χ^2 (4)	105.76	78.38	21.90
prob > χ^2	0.000	0.000	0.000

^a Parentheses contain t-statistic. Relationships significant at > .05 are in bold.

results in column 2 are quite similar to those in column 1. A similar regression for House Republicans achieves 96% accuracy with only the constant term, as Republicans were nearly unanimous in their support for the Walter–Logan bill.

The third column of Table 5 reports the results for the same regression for Senate Democrats. In this case we omitted the regression for all senators (and for Senate Republicans), as all Senate Republicans had support scores of one, and thus there was no variance in their support to explain. A simple party identification dummy variable explains Republican votes perfectly. The probit on Senate Democrats is quite similar to that for House Democrats, except that the coefficient on the dummy variable, South, is not significant in this latter probit. The breakdown of support scores in Table 4 already suggested that this would be the case.

The results provide strong support for our hypotheses. The Poole and Rosenthal measure of economic ideology, Economic Policy, is positive and significant in all of our regressions. Economic ideology is thus shown to be an important determinant of the structure of the administrative state and of the nature of administrative law.

Curiously, the Poole and Rosenthal measure of support for civil rights is insignificant in all of our regressions. While not surprised by this result, we checked to be sure that it was not the consequence of multicollinearity between support for civil rights and the dummy variable South. While highly correlated, when we dropped South from the regressions, Civil Rights remains insignificant. (We cannot reject the null hypothesis that South is insignificant in an *F*-test from the same regression.) Further, in regressions for each vote separately (not reported here), Civil Rights was significant only for the final two votes in the House in December 1940.

Because so many members of both houses abstained on these votes, we attempted to determine whether the independent variables in the voting regressions also explained the abstention rate. In the Senate, nearly 40% of the members abstained on the initial vote to consider Walter–Logan, and nearly half abstained on the second vote. Had these senators voted, the outcomes

could have changed. Hence we used tobit analysis to estimate three categories of voting: yes, no, and abstain. The results, not reported here, proved nothing. Democrat and South were not consistently significant, and the coefficients on Economic Policy and Civil Rights, while significant in every House vote, varied in sign. Thus we conclude that the large numbers of abstentions were not strongly correlated with either position on the bill.

Figure 6 provides a graphical representation of our regression results in the same two-dimensional model that was used to develop the theoretical argument (Figures 1–4 above). Figure 6 plots the ideal point of each member of the House and indicates that members vote on the motion to recommit the Walter–Logan bill. A “+” symbol indicates a vote in favor of recommitting the bill. The figure also shows the cutting line derived from the regression on the House votes to recommit, the slope of which is the ratio of the coefficients on the two ideological dimensions. The cutting line separates the members according to whether the regression predicts that they would vote in favor or against recommitment. The steep slope, downward and to the right, illustrates the dominant importance of the economic policy dimension in separating supporters and opponents.

In sum, the econometric results provide support for our theoretical perspective. Voting on the Walter–Logan bill pitted New Dealers against the conservative coalition. The latter sought to impose strict administrative procedures, granting courts significant powers to protect economic rights, as a way of fighting the New Deal. Although Roosevelt’s veto killed this measure, congressional passage nonetheless underscores the importance of policy in the formulation of administrative procedures. As our results suggest, administrative procedure was intimately involved with policy, not just normative issues of due process.

6. Conclusions

Positive political theory provides a conceptual framework for analyzing the political sources of the rise of procedural due process. The theory enables us to depict precisely how and why political conflict over procedures might have arisen, and how eventually a compromise solution by a coalition of the whole came about. The theory also leads to testable hypotheses about the configuration of preferences of members of Congress during the transition from New Deal control to the rise of the conservative coalition. Specifically, if our theory of the significance of administrative procedures in affecting economic policy is correct, the following must be true. First, a two-dimensional (at least) space must be needed to identify the differences among members on administrative issues. Second, from the mid-1930s to the mid-1940s, the differences among members in this space must be increasing, forming (at least) three distinct clusters, or coalitions, depicting conservative (southern) Democrats, New Deal (northern) Democrats, and Republicans. Third, the votes on administrative procedures must divide the members in a way that is strongly influenced by the economic policy dimension.

The analysis in this article answers a series of questions about the APA that are not addressed by the legal literature. Four questions have guided our analysis: (1) Why did New Deal Democrats oppose procedural limits during the 1930s

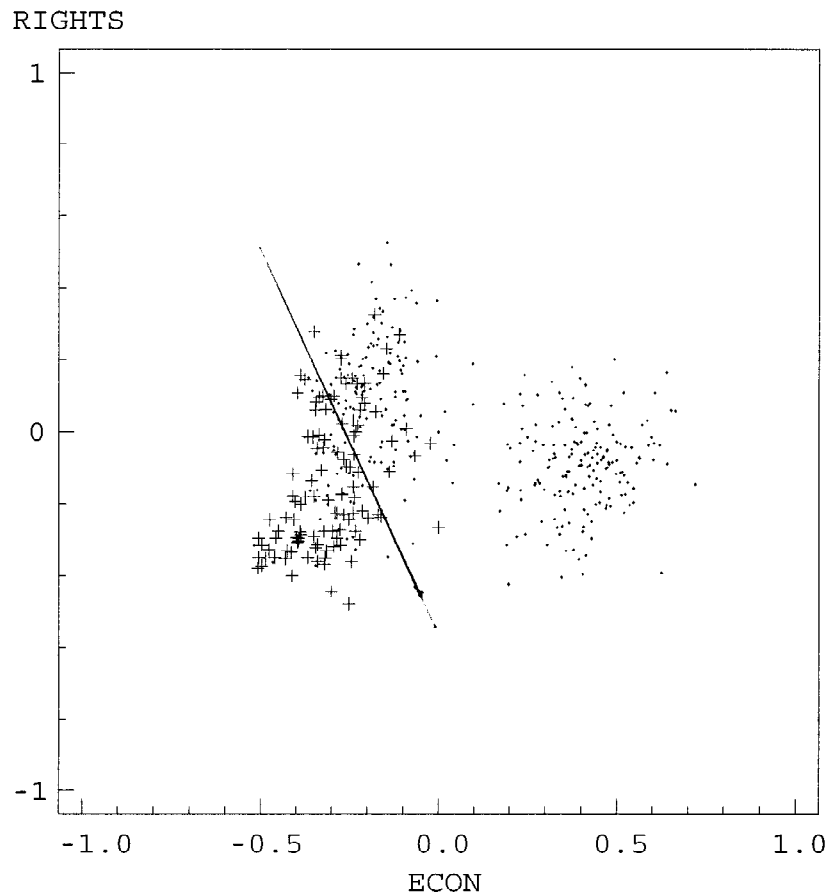


Figure 6. The House vote to recommit the Walter-Logan bill, 1940 (+ indicates yes vote).

and World War II but then agree to procedural limits in 1946? (2) Why did it take until 1946 to codify administrative procedures? (3) Why did the parties form a grand coalition in 1946? (4) Why did the APA contain some forms of administrative procedures while excluding others that had been proposed in previous bills? We answer these questions as follows.

The New Deal Democrats opposed procedural limits from 1933 until 1946 because these procedures would have hampered their implementation of the New Deal. As long as Democrats felt secure in their political control of the national government, administrative procedures would have harmed their interests. During this period they successfully opposed others seeking to impose procedural limits on New Deal agencies.

New Deal Democrats switched sides in 1946 because their political security had eroded. Their great leader, Franklin Roosevelt, was dead. Harry Truman,

a relative unknown, succeeded him, and most perceived Truman's chances of survival as slim. The significant probability of a Republican president altered the New Deal Democrats' preferences over procedure. Whereas they wanted freedom from administrative constraints while they were in control, they valued administrative constraints on a possible future Republican president as a means of helping to preserve New Deal policies. Thus the grand coalition formed in 1946 because the main opponents of administrative procedure, the New Deal Democrats, switched sides.

The APA contained some administrative reforms and not others because of their political effects. New Deal Democrats sought to create a more open process, one that would improve congressional monitoring and fire alarm oversight. These tools served to improve their ability to hinder policy changes in the event that the Republicans captured the presidency but they retained at least one house of Congress. Opponents of the New Deal all along sought greater rights for their regulated constituents. In 1946 they supported procedures ensuring greater procedural rights for citizens and firms. Thus they favored provisions that required agencies to provide substantial evidence in support of their findings.

A final aspect of our argument complements that of Cohen and Spitzer (1994) for the 1980s. The APA granted the courts, not agencies, the authority to interpret agency statutes. We argued above that this reflected the political goals of New Dealers in 1946. Granting agencies this authority would allow new administrators appointed by a Republican president to sabotage New Deal programs by simply announcing a new interpretation of their enabling statutes. The APA prevented this by granting the courts the authority to interpret statutes. This would allow Democrats and their constituents to use the courts to challenge successfully the willful disregard for the current interpretation of the statute by Republicans. An important component of this argument is that by 1946 the courts were populated largely by Roosevelt appointees sympathetic to the New Deal.

The courts altered the locus of the authority to interpret the statute during the very different circumstances of the 1980s. Initially Carter appointees dominated the lower federal courts and used their powers to blunt the impact of Reagan's antiregulation appointees to federal regulatory agencies. Then in the *Chevron* decision, with Republicans in control, the Supreme Court declared that agencies had the power to interpret their statutes. According to Cohen and Spitzer, the more conservative Supreme Court sided with the Reagan regulatory administrators against the lower federal courts. In both cases, the 1940s and the 1980s, political ideology formed the basis for deciding the authority of statutory interpretation.

The statistical analysis in this article supports this analysis. The preferences and behavior of members of Congress is consistent with our theory and rejects the theory that individual rights were the sole objective of procedural due process reforms.

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