

THE CHOICE BETWEEN SINGLE DIRECTOR AGENCIES AND MULTIMEMBER COMMISSIONS

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The question of how best to design a new agency is of immense public importance. Congress creates new agencies and reforms agency structures with some regularity, while commentators frequently call for the creation of new or redesigned agencies. Scholars have, as a result, increasingly turned to studying the diversity of agency structures and questions of agency design.

In this Essay, we tackle one of the decisions that must be made in designing any new agency—the choice between a single-director agency and a multimember commission—and we make a general case against multimember commissions. For the most part, scholarly discussion of these structures is interwoven with questions of agency independence. But these two questions—singularity and independence—can be pulled apart and assessed separately. Yet surprisingly little of the existing literature focuses systematically on this decision.

The central benefits of single-director agencies are that they better ensure agency efficacy at accomplishing statutory mandates, and that they offer clearer lines of responsibility and thus accountability for agency failures. Proponents of multimember commissions concede the inefficiency of its design but hold that inefficiency is desirable because it serves as a defense against liberty-infringing actions. We term this the “safeguards of liberty fallacy” and show that it rests on faulty foundations.

The most often discussed benefits of multimember commissions are that they enhance deliberation and accountability. Dissents also serve as a “fire alarm” signal to Congress and the courts of potential agency malfeasance and thus enable greater accountability. We do not disagree that these are potential benefits of a multimember commission, but we believe that these benefits are wildly overvalued, and their costs are widely undervalued. In addition to suffering from baseline problems, these arguments fail to take seriously the reality of asymmetric political polarization. Finally, we turn to the relationship between multimember

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commissions and regulated entities. We argue that the adjudicatory origins of multimember commissions cannot carry the weight of that design choice in an era of rulemaking, and we also suggest that multimember commissions might suffer from more acute industry capture than single-director agencies. In short, the general case against multimember commissions is extremely strong. Scholars and policymakers would be well-advised to recommend single-director agencies as a default presumption.

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INTRODUCTION

Throughout American history, Congress has not followed a single model for structuring Executive Branch agencies. Some are standalone; others are housed within larger departments. Some are closely tied to the President; others are independent. Some have single directors; others are run by multimember commissions. If there is a single truth, it is that federal agencies have diverse structures.¹

At the same time, the question of how *best* to design a new agency is of immense public importance. Congress creates new agencies and reforms agency structures with some regularity. Congress created a new Department of Homeland Security after the September 11, 2001 attacks. One of the newest federal agencies, the Consumer Financial Protection Bureau (CFPB),

1. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 520–21 (2010) (Breyer, J., dissenting) (noting that “statutes create a host of different organizational structures”); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 22 (7th prtq., 1966) (discussing “a range of administrative agencies characterized by an extraordinary diversity of methods and objective[s]”); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 849 (2014) (noting different agency structures at the federal level); cf. Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1551–60 (2019) (noting the diversity in structures of state level agencies).

was created in the wake of the financial crisis in 2008.² Commentators also frequently call for the creation of new or redesigned agencies, including a redesigned Federal Trade Commission (FTC),³ an industrial policy agency,⁴ an agency to police corruption,⁵ a Food and Drug Administration-style agency for algorithms,⁶ a federal regulatory agency for cybersecurity,⁷ and one for policing tech platforms.⁸ With any new or restructured agency come questions of institutional design. But despite the importance of this choice, one scholar has noted that actual agency designs appear to be chosen “almost by random selection,”⁹ while others have emphasized the political determinants of agency design.¹⁰

Scholars have, as a result, increasingly turned to studying the diversity of agency structures and questions of agency design.¹¹ Much of this work is

2. 12 U.S.C. § 5491(a) (2012).

3. GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, TAKING ANTITRUST AWAY FROM THE COURTS 11–13 (2018), <https://greatdemocracyinitiative.org/document/taking-antitrust-from-the-courts/>.

4. See Noah Smith, *How to Fill the Gaps in the U.S. Economy*, BLOOMBERG (Sept. 27, 2018, 10:01 AM), <https://www.bloomberg.com/opinion/articles/2018-09-27/how-to-fill-the-gaps-in-the-u-s-economy>; Robert E. Scott, *Sectoral Strategies and Participant Commitments: The Keys to Effective Trade and Industrial Policies*, 5 STAN. L. & POL’Y REV., Fall 1993, at 127, 139–40.

5. See ROOSEVELT INST. & GREAT DEMOCRACY INITIATIVE, UNSTACKING THE DECK: A NEW AGENDA TO TAME CORRUPTION IN WASHINGTON 21–22 (2018), <https://greatdemocracynitiative.org/wp-content/uploads/2018/05/Unstacked.pdf>.

6. See generally Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83 (2017).

7. David H. Petraeus & Kiran Sridhar, *The Case for a National Cybersecurity Agency*, POLITICO (Sept. 5, 2018, 5:18 AM), <https://www.politico.com/agenda/story/2018/09/05/cybersecurity-agency-homeland-security-000686>.

8. Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1207–08 (2008).

9. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 258 (1988) (“New agency structures often appear to be created in a vacuum or almost by random selection. Only in a few cases has consideration been given to the choice of executive versus independent format, and those exceptional situations involve rethinking organizational choices previously made.”).

10. See generally DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 (2003) (presenting how and why agencies are organized in a certain way and exploring the impacts agency design decisions). We are also indebted to Jim Rossi for the observation that some commissions, like the Federal Energy Regulatory Commission (FERC), often incorporate geographic diversity through their membership.

11. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 15 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 769 (2013); Brian D. Feinstein, *Designing*

descriptive. One study of eighty-two federal agencies found that thirty-nine are run by single directors (four of which have statutory removal protection) and forty-three are multimember commissions (nineteen of which have statutory removal protection).¹² Twenty-seven multimember commissions have partisan balance requirements; sixteen do not.¹³ Agency diversity is expressed in other ways too, including whether they have full or partial litigation authority independent of the Department of Justice, the extent of congressional review over the agency, and whether they have adjudicatory authority.¹⁴ Scholars have also gone further and evaluated the dynamics of partisan balance requirements,¹⁵ offered design strategies to combat regulatory capture,¹⁶ and outlined the tradeoffs in consolidating agencies.¹⁷

In this Essay, we tackle one of the critical decisions in designing any new agency—the choice between a single-director agency and a multimember commission—and we make a general case against multimember commissions.¹⁸ For the most part, scholarly discussion of these structures is interwoven with questions of agency independence.¹⁹ But these two questions—

Executive Agencies for Congressional Influence, 69 ADMIN. L. REV. 259, 259 (2017).

12. See Datla & Revesz, *supra* note 11, at 784, 793 (detailing agency structure and removal procedures).

13. *Id.* at 797.

14. See *id.* at 799–809.

15. See generally Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018).

16. See generally Barkow, *supra* note 11; PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

17. See generally Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006).

18. Historically, it is worth noting that multiple government commissions have desired to reform the independent commission design. See, e.g., PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 37, 38 (1937) [hereinafter Brownlow Report]; PRESIDENT’S ADVISORY COUNCIL ON EXEC. ORG., A NEW REGULATORY FRAMEWORK—REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 31–44 (1971) [hereinafter Ash Council Report]. However, we remain struck by how little the scholarly literature has engaged this question squarely, and particularly when separated from the question of independence.

19. The literature is large. See, e.g., Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–06 (2010); Datla & Revesz, *supra* note 11, at 842–43; Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 224–25, 237 (1988); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 1 (2013); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1487 (2015); Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2391 (2011); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1163 (2013).

singularity and independence—can be pulled apart and assessed separately. There are single-director federal agencies that are relatively independent,²⁰ and multimember commissions that are not.²¹ Yet surprisingly little of the existing literature focuses systematically on this decision in and of itself.

The central benefits of single-director agencies are that they better ensure agency efficacy at accomplishing statutory mandates, and that they offer clearer lines of responsibility and thus accountability for agency failures. We outline these benefits, which will likely seem conventional, if not obvious, in Part I. Notably, for those who want federal agencies that are attentive to health and safety, regulated capitalism, and enforcement of the laws, a single-director agency is superior to a multimember commission, even if there may be administrations in which the director of the agency is hostile to the agency's mission. Proponents of multimember commissions generally concede the inefficiency of their design but hold that inefficiency is desirable because it serves as a defense against liberty-infringing actions. We term this the “safeguards of liberty fallacy” and show that it rests on faulty foundations. The safeguards of liberty fallacy ignores that government inaction can leave in place liberty-infringing forms of *private* tyranny. It is also an unpersuasive justification in the many cases in which regulations are congressionally commanded. Indeed, in those cases, inefficiency seems to undermine both Article I's commands and Article II's Take Care obligation. Along the way, we make additional arguments against multimember commissions, including showing that commission slots can be—and have been—manipulated during the nomination process to entrench co-partisans, something that, so far as we can tell, has not been identified before in the literature.

The most often discussed benefits of multimember commissions are that they enhance deliberation and accountability. The deliberations of a diverse commission, the argument goes, will lead not only to more moderate results but better reasoned opinions. Dissents also serve as a “fire alarm” signal to Congress and the courts of potential agency malfeasance and thus,

20. Examples include the Commissioner of the Social Security Administration and the Comptroller of the Currency. See, e.g., HENRY B. HOGUE, MARC LABONTE & BAIRD WEBEL, CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 7 (2017), <https://crsreports.congress.gov/product/pdf/R/R43391> (“[T]he [Office of the Comptroller of the Currency (OCC)] is considered independent from the Administration”); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 951 (2011) (“Congress gave [the Consumer Financial Protection Bureau (CFPB)] substantial independence in making policies, issuing regulations and bringing enforcement proceedings, and . . . provided CFPB with an independent source of funding that does not depend on either congressional appropriations or industry-paid assessments.”).

21. Datla & Revez, *supra* note 11, at 793.

enable greater accountability. We do not disagree that these are potential benefits of a multimember commission, but we believe that these benefits are significantly overvalued, and their costs are widely undervalued. First, in a comparison between single-director and multimember agencies, the critical question is not whether multimember commissions have these benefits but what the marginal benefit is over and above the baselines required by the administrative process that also applies to single-director agencies. In the absence of empirical studies designed to address this question head on, and in hopes that future studies will test this proposition, we argue that the marginal benefits are not as large as some might think. Second, we argue that government-in-the-sunshine laws chill deliberation between commissions, diminishing the deliberation argument. Third, severe asymmetric political polarization further reduces the marginal benefits of multimember commissions. We should not expect that polarized commissioners are deliberating or dissenting with some kind of platonic public good in mind; rather, we should expect them to pursue partisan aims. This weakens the moderation, information-forcing, and “fire alarm” arguments. Partisan dissents are a noisy signal that could indicate agency malfeasance. But they could also serve as roadmaps for partisan groups to challenge the decision, partisan judges to strike down the decision, and partisan legislators to attack the agency’s actions. Far from being a mechanism for neutral good government, they might actually undermine the agency’s ability to follow its statutory commands. Part II discusses these arguments.

In Part III, we turn to the relationship between multimember commissions and regulated entities. Another argument for multimember commissions is that historically, commissions were largely engaged in adjudications—either case-by-case determinations between parties or rate-evaluating procedures to enforce just and reasonable rates. Commissions have served as expert, administrative alternatives to appellate courts, and their multiplicity was thus based on a judicial analogue. But agencies in the regulatory state have generally shifted from case-by-case adjudication to rulemaking as their primary mode of policymaking, and as a result, this argument for a multimember structural design is far less persuasive than it once might have been. We also consider in this Part the argument that commissions are more susceptible to capture by regulated entities than single-director agencies. There is some evidence that the Interstate Commerce Commission (ICC) was designed deliberately with capture in mind (i.e., to serve the railroad interests), and some modern evidence that suggests capture may be more prevalent in commissions. While conclusions here must necessarily be tentative given the limited evidence, this further weakens the case for multimember commissions.

As a result, we conclude that multimember commissions should be presumptively disfavored vis-à-vis single-director agencies. Presumptively, of course, means just that. We do not deny that in some cases, there might be reasons (including, of course, political ones) to institute a multimember commission. But we argue that, in general, the most effective agency is one run by a single director.

It is also worth noting that our argument is not a constitutional one, though it may have constitutional implications. Following longstanding Supreme Court precedent, we presume that a range of agency designs are constitutionally viable.²² Longstanding historical practice also supports Congress's authority to pursue any number of agency designs.²³ Multimember commissions have been around at least since the Steamboat Safety Act of 1852, which created a multimember board with rulemaking power,²⁴ and the number of multimember commissions has steadily expanded, with the creation of the ICC, the International Trade Commission, the Federal Reserve Board, the FTC, and the Federal Home Loan Bank Board—all before the New Deal further used the form.²⁵

Still, while we presume constitutionality, debates over the constitutionality of the single-director structure and multimember commissions sometimes rely on functional considerations to support their constitutional analyses. Most prominently, then-Judge Kavanaugh's opinion dissenting on the constitutionality of the CFPB's independent single-director structure relied on a number of functional arguments in support of its constitutional conclusions.²⁶ To the extent that one has a theory of constitutional interpretation that incorporates functional concerns directly or indirectly into the analysis, this Essay demonstrates that many of the functional arguments for commissions are flawed.

22. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010); *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621, 626 (1935).

23. On historical practice, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103 (2013) (“Reliance on historical practice is a mainstay of decisionmaking and debates concerning the scope of presidential power.”).

24. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 194 (2012).

25. Sean Croston, *The Chairman or the Board? Appointments at Multimember Agencies*, 51 SAN DIEGO L. REV. 247, 253 (2014); see also Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 438 (1999).

26. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 184 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

I. EFFECTIVENESS, ACCOUNTABILITY, AND THE SAFEGUARDS OF LIBERTY FALLACY

One of the standard arguments for a single-director structure over a commission is that the former is typically more efficient and productive than the latter. We begin this Part by explaining why that is the case. Essentially, a central feature of a multimember commission is that a majority of commissioners need to agree before moving forward with any action. Almost by definition, this requirement means that it is more difficult for a commission to undertake serious action than it is for a single-director agency. In addition, single directors offer benefits in terms of accountability—they are both empowered to act and transparently responsible for their actions. This enhances the ability of members of Congress and the general public to know who to praise or blame for agency actions.

However, proponents of commission-based structures argue that because commissions are less effective, they are preferable. These commentators maintain that regulations are necessarily liberty-diminishing, and thus, a commission enhances the liberty of regulated people or industries. We call this argument the “safeguards of liberty fallacy” because it incorrectly fails to consider that there are liberty interests on both sides of any regulation and to account for congressional commands to regulate. Accordingly, the enhancement of liberty is not a persuasive reason to prefer the inefficacy demonstrated by commissions.

A. *The Effectiveness of Single-Director Agencies*

It is longstanding and well-known that the executive branch was framed with one person at the helm because “unitariness advance[s] the interests of coordination, accountability, and efficiency in the execution of the laws.”²⁷ But this argument is not simply limited to the President or the constitutional context. Single-director agencies, like a singular president, unify power under an active and energetic leader with ultimate decisionmaking authority. In contrast, multimember executives have to coordinate before acting, which necessarily means a slower and less energetic execution of the laws. For a multimember commission to move forward with significant actions, a majority of commissioners need to agree to do so.²⁸ As Professor Adam Levitin has noted,

27. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93 (1994).

28. See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1182 (2000) (“[M]ost multi-member federal agencies follow the common law ‘majority of the quorum’ rule, which means that a quorum is needed before the agency may act, but only a majority of the quorum is needed

because commissions “permit[] rules to be promulgated only when a quorum . . . affirmatively votes for the rules,” they “induce inefficiency in government.”²⁹ Even beyond deliberation, negotiations, and other coordination costs, the simple fact of needing a set number of votes slows government action.

Second, commissions are often restrained from moving forward with various rules or other actions unless a certain number of commissioner seats are filled. The quorum requirement causes additional gridlock because of “frictions in the Senate confirmation process”³⁰ Many commissioner positions—including those at the FTC, the Consumer Product Safety Commission (CPSC), and the National Labor Relations Board (NLRB), for example—have remained open because the Senate’s internal rules “effectively create supermajority requirements not found in the Constitution.”³¹ The confirmation process results in blocked nominations, and it chills potential nominations by Presidents who might not want to spend political capital filling a particular seat.³² “Simple math,” Levitin notes, “says that five confirmations are more difficult to achieve than a single confirmation (even if multiple appointments set up opportunities to make political deals on appointments).”³³

Third, directors and commissioners typically serve for set terms, and they often leave before their terms are up. The average tenure of a political appointee is only two-and-a-half years.³⁴ Between confirmed directors and

for action once a quorum is constituted.”); Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 793–94 (2010) (“The [Federal Communications Commission (FCC)] commissioners vote on all major administrative actions, such as reports and orders, notices of proposed rulemakings, notice of inquiries, informational reports, notices of liability[,] and other enforcement actions”).

29. *Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 3 (2011) (testimony of Adam Levitin, Professor of Law, Georgetown University Law Center), <http://archives-financialservices.house.gov/media/pdf/040611levitin.pdf> [hereinafter Levitin Testimony]; see also Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 937 (2009) (noting that vacancies in multimember commissions present additional complications when compared with single-director agencies).

30. Levitin Testimony, *supra* note 29, at 3. For a list of every multimember agency with quorum rules, see JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 45–48 (2d ed., 2018), <https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agencies%202d%20ed.%20508%20Compliant.pdf>.

31. Levitin Testimony, *supra* note 29, at 3.

32. *Id.* at 3.

33. *Id.* at 4.

34. James P. Pfiffner et al., *Strong Executive Branch Leadership Crucial for Policy Implementation*, PUB. MANAGER, Winter 2012, at 37, 38.

commissioners, it is not unusual for there to be an acting director or commissioner, who may have more limited power—or less legitimacy—than someone who was congressionally confirmed.³⁵ At the very least, even if a new confirmed director or commissioner is in place the day after the previous person holding that position leaves, there is always a transition period for staff and policy priorities.³⁶ A leader who leaves in the middle of a rulemaking typically leaves the rule in limbo, as a new leader may have different viewpoints or priorities, setting the process back. This problem has long been understood. For example, in studying the CPSC in 1987, the General Accounting Office (GAO) concluded that its multimember commission was ineffective and that it “could benefit from changing to a single administrator,” in part because the CPSC had experienced “leadership turnover [that was] the cause of much uncertainty within the Commission.”³⁷

Fourth, the sluggishness of commissions can interfere with the deadlines Congress sometimes sets for agency rulemakings. These deadlines are one of “the most obvious way[s] of controlling agency behavior” and are thus of considerable importance in preserving basic constitutional commitments.³⁸ Within the mandated deadline, an agency will need to hold meetings with stakeholders, draft a proposed rule, go through the Administrative Procedure Act’s (APA’s) notice-and-comment process, and revise the proposed rule to address any significant issues raised during the process. It is already difficult for agencies to meet congressional timelines, which may not account for all of the various stages of rulemaking—and many timelines also have congressionally-mandated lengths, such as comment periods.³⁹ For example, the Dodd-

35. O’Connell, *Vacant Offices*, *supra* note 29, at 920 (noting that “acting officials” often lack “sufficient authority” to carry out an agency’s mission). See generally Neal K. Katyal & George T. Conway III, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> (stating that President Trump’s appointment of an Acting Attorney General is unconstitutional).

36. NAT’L ACAD. OF PUB. ADMIN., AGENCIES IN TRANSITION iii (2009), https://www.napawash.org/uploads/Academy_Studies/02-09.pdf (“[L]eadership transition in government is a constant process.”).

37. *Administrative Structure of the Consumer Prod. Safety Comm’n: Hearing Before the Subcomm. on Consumer of the S. Comm. of Commerce, Sci. and Transp.*, 100th Cong. 1–2 (1987) (testimony of Franklin Frazier, Associate Director of the Human Resources Division of the U.S. General Accounting Office); see also Arthur E. Wilmarth, Jr., *The Financial Service Industry’s Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 920–21 (2012).

38. Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 925–26 (2008) (noting also that “it is rare that Congress specifies the actual content or substance of agency decisions”).

39. See Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV.

Frank Act, passed on July 21, 2010, required the CFPB to promulgate new protections for high-cost mortgage loans not later than January 21, 2013.⁴⁰ The agency did not even open its doors until July 2011,⁴¹ and it was not fully staffed for another year or so. This amounted to a very short period of time to promulgate regulations that would reform the U.S. mortgage market.

In addition to the general challenges of meeting congressional deadlines, there is evidence to suggest that multimember commissions might be worse than single-director agencies at following these congressional commands. Compare, for example, the difference between the Securities and Exchange Commission (SEC) and CFPB in meeting statutory deadlines in the Dodd-Frank Act. The Act required agencies to promulgate approximately four hundred new rules.⁴² It is estimated that the SEC was mandated or authorized to promulgate about ninety-eight rules, seventy-seven of which had deadlines.⁴³ As of November 1, 2012, it had finalized thirty-two and missed deadlines on fifty.⁴⁴ The CFPB was mandated to promulgate about thirty-four rules, eight of which had deadlines.⁴⁵ As of January 31, 2013, the CFPB had missed no

733, 734–35 (2016) (“Drafting a proposed rule can take months, even years, of internal debate and effort. Agency staff must draft regulatory text along with legal justifications and cost-benefit analyses. To do so, they must gather the requisite data to make informed decisions.”).

40. 15 U.S.C. §§ 1602, 1639 (2012); *see also* 12 C.F.R. pt. 1026 (2013) (containing the rules promulgated by CFPB); CFPB Releases Semiannual Regulatory Agenda (12 C.F.R. ch. X), Fed. Banking L. Rep. (CCH) ¶ 151–626, 2012 WL 12338292 (May 1, 2012) (acknowledging that CFPB was generally required to prescribe final rules mandated by the Dodd-Frank Act by January 21, 2013).

41. Press Release, Consumer Fin. Prot. Bureau, CFPB Ready to Help Consumers on Day One (July 21, 2011), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-ready-to-help-consumers-on-day-one>.

42. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

43. DAVIS POLK & WARDELL LLP, *Dodd-Frank Progress Report*, DAVISPOLK 1, 5, 9 (Sept. 2011), https://www.davispolk.com/files/files/Publication/c632492a-c142-4582-8cb2-03aa1d181dfd/Presentation/PublicationAttachment/39cb57c5-25b5-4890-af03-0591b7515a4b/090611_Dodd.Frank.Progress.Report.pdf; *see also* MICHAEL P. MALLOY, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, in BANKING LAW AND REGULATION § 1C.10 (2d ed. 2011 & Supp. 2019), Westlaw BKLAR; CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 7 (2010), <https://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf>.

44. MALLOY, *supra* note 43.

45. DAVIS POLK & WARDELL LLP, *supra* note 43, at 9; *see also* COPELAND, *supra* note 43, at 7 (stating the Dodd-Frank Act featured forty-two mandatory and discretionary provisions referencing rulemaking).

deadlines.⁴⁶ While it is true that the SEC had far more regulations to address during this period, it is also notable that the CFPB did not exist at the time the Act was passed—nor did it have a confirmed head until years later.⁴⁷

Finally, some might argue that multimember commissions are more effective than single-director agencies because they offer greater stability for regulations that have been promulgated.⁴⁸ That is, single-director agencies will be susceptible to extreme swings in policy, compared to multimember commissions. We think this argument largely mistakes inaction for stability. The claim rests first on the assumption that both single-director agencies and multimember commissions are able to promulgate regulations with similar regularity and efficacy. But this is not evident. As we have discussed, there is

46. See *Defining Larger Participants of the Consumer Reporting Market*, 77 Fed. Reg. 42,874, 42,874 (July 20, 2012) (to be codified at 12 C.F.R. pt. 1090) (showing a rule required by July 21, 2012, was issued on July 20, 2012); *Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 10,902, 10,913–14 (Feb. 13, 2013) (to be codified at 12 C.F.R. pt. 1026) (issued on January 17, 2013, and delayed implementation of certain new mortgage disclosure requirements that would otherwise take effect on January 21, 2013, to allow industry additional time for adjustment); *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. 10,696, 10,708 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024) (issued on January 17, 2013); *Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Variations Under the Equal Credit Opportunity Act (Regulation B)*, 78 Fed. Reg. 7216, 7216 (Jan. 31, 2013) (to be codified at 12 C.F.R. pt. 1002) (issued on January 18, 2013); see also *Consumer Fin. Prot. Bureau, SEMI-ANNUAL REPORT OF THE CONSUMER FIN. PROTECTION BUREAU*, July 1–Dec. 31, 2012, at 1, 54, https://files.consumerfinance.gov/f/201303_CFPB_SemiAnnualReport_March2013.pdf (noting that the Bureau had “issued a number of proposed and final rules on mortgage-related issues” since July 2012 “in anticipation of meeting a January 21, 2013 deadline under the Dodd-Frank Act”); Adam J. Levitin, *BankThink: What the CFPB ‘Commission’ Debate Is Really About*, AM. BANKER (Dec. 29, 2016), <https://www.americanbanker.com/opinion/what-the-cfpb-commission-debate-is-really-about>.

47. Richard Cordray was confirmed as the first head of the Consumer Financial Protection Bureau on July 16, 2013, almost two years after the Bureau opened its doors, and three years after it was established in the Dodd-Frank Act. See Danielle Douglas, *Senate Confirms Cordray to Head Consumer Financial Protection Bureau*, WASH. POST (July 16, 2013), https://www.washingtonpost.com/business/economy/senate-confirms-consumer-watchdog-nominee-richard-cordray/2013/07/16/965d82c2-ee2b-11e2-a1f9-ea873b7e0424_story.html.

48. Independent agencies are often justified in these terms, though it is worth noting that it might be the independence, rather than multimember design that provides such stability. See, e.g., Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 331 (2013) (“[I]ndependent agencies can prioritize long-term policy goals . . . and ensure regulatory stability.”); Anne Joseph O’Connell, Symposium, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 526 (2011) (noting stability comes with independence and is tied to expertise).

good reason to believe that multimember commissions have a more difficult time promulgating regulations and therefore will be less effective in meeting Congress's commands to regulate. Inaction can be stable or unstable, depending on the expectations of an agency's stakeholders and regulated parties, but stability does not make inaction legitimate.

Scholars have also shown that political polarization is not only real but also asymmetric; conservatives have moved further to the extreme than have liberals.⁴⁹ Given asymmetrical political polarization, it is likely that conservative appointees will consistently prefer no regulations or deregulation to regulation while not all liberal commissioners will be as aggressively in favor of regulation. This has some important consequences. Single-director agencies in Republican administrations are unlikely to regulate (or are likely to attempt to roll back some measure of regulation). Multimember commissions with three Republican commissioners are also likely not to regulate (or are likely to attempt deregulation). In contrast, in single-director Democratic agencies, the likelihood of regulation turns on a single appointment. A responsible agency head will follow Congress's commands to regulate according to statutory guidelines. But a multimember commission in a Democratic administration will require three Democrats who take this responsibility seriously. Given that Democrats are less asymmetrically polarized than Republicans, it is less likely that three such people will be confirmed to the commission. We should systematically expect, as a result, that Democratic multimember commissions will fulfill their statutory responsibilities less well than Democratic single-director agencies.

To the extent there are policy swings that come with single-director agencies, then in a polarized environment, the single-director agency will have a flavor of two steps forward, one step back, given the stickiness of regulatory actions. But with multimember commissions, regulatory change will move at a snail's pace, if it moves at all. Democrats who prefer multimember commissions because they fear what might happen when Republicans are in charge of a single-director agency thus mistake stability for inactivity. Asymmetric partisan polarization means greater stability, but it is a stability

49. See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM xiv (2012); Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 59, 66 (Nathaniel Persily ed., 2015); Nolan McCarty, *What We Know and Don't Know about Our Polarized Politics*, WASH. POST (Jan. 8, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?utm_term=.c9945b6795fa. On the application to constitutional hardball, see Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 929–35 (2018).

that systematically favors inaction or deregulation—even when Congress commands otherwise. And in our view, stability that ignores or defies Congress’s laws is no virtue.

To the extent instability is a concern on its own terms, we have two responses. First, regulations are sticky.⁵⁰ Even with political differences between administrations, it is striking that many administrations do not roll back all of the regulations of their predecessors of a different party. In part, this results from the difficult and time-consuming nature of the rulemaking process.⁵¹ It also may be a function of private sector adaptation over time.⁵² Second, to the extent that instability is of concern to regulated parties, members of Congress, or the general public, single-director agencies offer greater opportunities for accountability.

B. *Unity, Responsibility, and Accountability*

Every agency is subject to some level of “control” or oversight from the Legislative and Judicial Branches of government, in addition to the general public.⁵³ But to the extent one is worried about holding agencies accountable for their actions, single-director agencies are generally superior. First, in their very design, single-director agencies provide a focal point for praising, critiquing, or attempting to alter agency action. As the Supreme Court noted in *Free Enterprise Fund*, “diffusion of power carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”⁵⁴ Unified power, on the other hand, “permits unified accountability”⁵⁵ and enables “streamlined, decisive leadership and decisionmaking.”⁵⁶ A single director has power, and as a result, cannot place blame on others.

50. See generally Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018).

51. *Id.*

52. Nielson notes that industry will make investment-backed decisions based on regulatory assumptions. *Id.* at 120–23. This would also give industry an incentive to lobby for agencies not to make further regulatory changes.

53. See generally JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587–96 (1984) (addressing the various interactions between agencies and other governmental bodies).

54. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961)).

55. Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1365 (2012).

56. Levitin Testimony, *supra* note 29, at 1.

In contrast, multimember commissions diffuse responsibility for actions among commissioners, making it more difficult for the various branches—and the public—to know who should be held accountable for particular actions or inactions. “A gang of commissioners,” one scholar notes, “can always avoid responsibility by pointing to the other four people who make up the commission.”⁵⁷ If a particular rule is slowed down at a commission, for example, it is difficult to know whose fault the delay is. This is not just a problem from the standpoint of public accountability; it also has tangible effects on the government’s ability to function. The President may not be fully aware of who should be removed from a commissioner position, and Congress’s oversight function is hampered because it is unable to focus its energy at hearings on commissioner-specific issues. As a 1971 report concluded, commissions are “not sufficiently accountable to either Congress or the executive branch.”⁵⁸

And even where presidential removal of a director is not permissible, the broad public can mobilize for or against an agency director. This public pressure is likely to be simpler and more effective in the case of a single-director agency than a multimember commission. There is literature in behavioral psychology that suggests people have an easier time focusing when directed toward a specific individual over groups of people.⁵⁹ Single-director agencies offer a personified hero or villain for public interest groups, industry associations, journalists, and commentators to praise or blame for the agency’s actions—and to push members of Congress to celebrate or attack those leaders. Thus, conservatives and industry groups could attack Gina McCarthy, the head of the Environmental Protection Agency (EPA) under President Obama,⁶⁰ while liberals and environmental groups could organize

57. *Id.* at 4.

58. Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 662 (2005) (quoting Ash Council Report 14 (1971)); see also Stephen Breyer, *The Ash Council’s Report on the Independent Regulatory Agencies*, 2 BELL J. ECON. & MGMT. SCI. 628, 628 (1971) (The Council’s “major recommendation . . . is to abolish the job of commissioner with a fixed term of office, and to substitute single administrators directly responsible to the President.”).

59. Psychologists studying “affect” have found that people have an easier time making judgments when focused on a single person than a group, and are particularly bad when confronted with large numbers. For an overview of the literature, with specific application to the problem of mass atrocities, see Paul Slovic, et al., *Psychic Numbing and Mass Atrocity*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 126, 130 (Eldar Shafir ed., 2013).

60. See, e.g., S. COMM. ON ENV’T & PUB. WORKS, 113TH CONG., A CALL FOR SUNSHINE: EPA’S FOIA AND FEDERAL RECORDS FAILURES UNCOVERED 9, 19 (Minority Rep. Sept. 9, 2013), https://www.epw.senate.gov/public/_cache/files/5091690a-1c27-4e07-98aa-e4074a117dab/callforsunshineinepasfoiaandfederalrecordsfailuresuncovered.pdf; Jason Plautz &

around opposing Scott Pruitt, the head of the EPA under President Trump.⁶¹ Personified praise and blame against the single directors of the CFPB and Department of Education are similar.⁶² Even aside from partisan opposition, public pressure against a single director can lead to a director's resignation or removal when unfit for the role.⁶³

One could argue that blaming a director might be a mistake, given that the director could simply be responding to the President's policy preferences. But in such cases, the line of accountability runs through the President and the President would also take some of the blame for her appointee's decisions. In other words, public preferences might be directed at the agency head or the President, but in both cases accountability values are served by single-director agencies.⁶⁴

In addition, the combination of multiple commission slots, set terms, and increasing partisanship in the administration also creates an opportunity for presidents to manipulate commission nominations to benefit and entrench ideological co-partisans in agencies—with comparatively low public salience. As far as we are aware, this dynamic has not been identified before in the literature.⁶⁵ Here is how it works: Assume a commission with seven-year

Jean Chemnick, *McCarthy to Face Barrage of Agency Criticism*, E&E News (Apr. 9, 2013), <https://www.eenews.net/stories/1059979091>.

61. Mollie Ziegler Hemingway, *Scott Pruitt is Trump's Biggest Asset. That's Why the Left Wants Him Gone*, FEDERALIST (Apr. 4, 2018), <https://thefederalist.com/2018/04/04/scott-pruitt-is-trumps-biggest-asset-thats-why-the-left-wants-him-gone/>; Robinson Meyer, *Why Scott Pruitt's Critics Will Miss Him*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/science/archive/2018/07/why-scott-pruitts-critics-will-miss-him/564578>.

62. Steve Eder, Jessica Silver-Greenberg & Stacy Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/business/consumer-financial-protection-bureau.html>; Rachel Wegner, *Critics of Betsy DeVos Rally on Education Department's Turf*, EDUC. WEEK (Feb. 8, 2018, 6:45 PM), <http://blogs.edweek.org/edweek/teacherbeat/2018/02/critics-of-betsy-devos-rally-on-education-departments-turf.html>.

63. See, e.g., Julie Turkewitz & Coral Davenport, *Ryan Zinke, Face of Trump Environmental Rollbacks, Is Leaving Interior Department*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/us/ryan-zinke-interior-secretary.html> (announcing Zinke's departure in light of several public ethics investigations).

64. The classic article on this and related points is, of course, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001).

65. The closest argument along these lines that we have found is in Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 471 (2008), which notes that, “Presidents leaving office usually select their own partisans for the appointments that will last longest into the new administration.” But they do not discuss this point further, and instead focus primarily on the consequences of “batching,” multiple simultaneous nominations to fill openings. *Id.* at 489–90. Batching also contributes

terms has five slots, two of which are vacant. One of the slots, Slot A, was vacated by a Republican commissioner one year before his term ended; accordingly, whoever fills the slot will have one year in her term. Slot B was vacated at the end of a Democrat commissioner's term; whoever fills it will have a full seven-year term. Because partisan balance requirements focus on the makeup of the entire commission, party alignment need not run with particular slots. Accordingly, a Republican president can appoint a Republican to Slot B, and a Democrat to Slot A. The consequence is that the Democratic commissioner in Slot A would, in theory, need to be reappointed or could be replaced (through a new nomination) after only a year, while the Republican commissioner in Slot B would have a full term. The short length of the Democrat commissioners' terms leads to increased instability on that side of the commission, while Republican commissioners will have longer terms to settle into their roles and accomplish policy objectives.

This is not a theoretical concern. At the beginning of the Trump Administration, the FTC had multiple open slots, ultimately resulting in full turnover at the Commission.⁶⁶ In January 2018, President Trump nominated Rohit Chopra as a Democratic Commissioner to the slot vacated by Joshua Wright, a Republican Commissioner whose unexpired seven-year term started September 26, 2012. That means Chopra's term expires September of 2019, at which point a new nominee could be put forward for that slot. At the same time, President Trump nominated Joseph Simons as a Republican Commissioner to the slot vacated by Democratic Commissioner Terrell McSweeney for a term that started September 26, 2017. Simons can therefore serve until 2024.⁶⁷ The combination of these two actions is to insulate the Republican commissioner through a longer term of service while simultaneously destabilizing the Democratic commissioner. This dynamic may serve the President's ideological interests, but it does so in a manner that is comparatively non-transparent vis-à-vis the appointment of heads of single-director agencies.

C. *The Safeguards of Liberty Fallacy*

One argument in favor of multimember commissions is that their comparative ineffectiveness is actually a feature, not a bug. Commissions "divide and disperse power across multiple commissioners or board members," so they reduce the "risk of arbitrary decisionmaking and abuse of power, and

to polarization, as Senators push for a package of partisans to be nominated. *Id.*

66. See Josh Hendel, Li Zhou, & Ashley Gold, *White House Nominates 4 to FTC*, POLITICO (Jan. 25, 2018), <https://www.politico.com/story/2018/01/25/trump-federal-trade-commission-seats-369456> (noting that "the slate is being wiped clean" within the FTC).

67. Press Release, White House, *Five Nominations Sent to the Senate Today* (Jan. 25, 2018), <https://www.whitehouse.gov/presidential-actions/five-nominations-sent-senate-today/>.

help[] protect individual liberty.”⁶⁸ In a dissenting opinion in *PHH Corp. v. Consumer Financial Protection Bureau*—in which the D.C. Circuit ruled en banc that the CFPB’s structure is constitutional—then-Judge Kavanaugh explained this theory: “Before the agency can infringe your liberty in some way—for example, by enforcing a law against you or by issuing a rule that affects your liberty or property—a majority of commissioners must agree.”⁶⁹ His position seems to incorporate two concerns: one about arbitrary action, which we address in Part II, and another about the protection of liberty, which we term the “safeguards of liberty fallacy.”⁷⁰

The safeguards of liberty argument is a fallacy because it rests on logically weak grounds, and in this context, raises questions of constitutional significance. First, this line of thought assumes that government action is always a net infringement on liberty. This is manifestly incorrect. We are hard-pressed to think of a single regulation that does not at once enhance the liberty of some groups and infringe on the liberty of others. For example, if the EPA stops a factory from dumping toxic waste into a river, this very well may infringe on the factory owner’s liberty. But it enhances the liberty of swimmers and fishers, who may want to enjoy the river or profit off its use. There are liberty interests on both sides of the equation, not just one. Yet the safeguards of liberty fallacy illogically assumes that regulations present only costs to liberty, rather than benefits, to claim that all regulations are liberty-infringing. Nor does it consider net liberty. For those truly interested in maximizing liberty, the slowness and inefficiency of multimember commissions may actually inhibit the swimmers’ and fishers’ liberty far more than it enhances the factory owner’s liberty. In other words, inefficiency in government simply prioritizes the liberty of one group (often industry players) at the expense of another (often consumers) without justification.

The safeguards of liberty fallacy smuggles in a libertarian view that only government can infringe liberty, without the accompanying realization that private actors also infringe on liberty and that one of the purposes of government action is to prevent private oppression. Despite the appealing rhetoric, this approach

68. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

69. *Id.* at 183 (Kavanaugh, J., dissenting).

70. This argument appears elsewhere in judicial opinions. See, e.g., *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1955 (2015) (Roberts, C.J., dissenting) (“[T]he values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole.”); *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (“We recognize, of course, that the separation of powers can serve to safeguard individual liberty”); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

takes a fundamentally mistaken approach to the goals of our constitutional order. As James Madison wrote in Federalist 51, “[y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.”⁷¹ The safeguards of liberty argument focuses on the second half of that sentence; dividing government prevents governmental tyranny. But the first half is about empowering government to prevent private tyranny.

Second, the safeguards of liberty fallacy ignores the fact that agency regulations are often congressionally mandated.⁷² A preference for commissions because they slow down agency action ignores the fact that agencies are established to carry out congressional commands. When Congress requires an agency to promulgate a rule, whether that rule is net-liberty infringing or whether it simply prioritizes the liberty of some over others, it is not clear why the safeguards of liberty argument should apply at all. Congress has already made the policy choice. The task of the agency is simply to follow Congress’s orders.

In fact, this preference for inefficiency arguably leads to a harm of great constitutional significance. Agencies are set up by Congress to execute congressional commands, including promulgating regulations, enforcing laws, and adjudicating disputes. If an agency fails to fulfill its congressional mandate, it is at once an affront to Congress’s Article I powers and a failure of the President’s Article II duty to take care that the laws are faithfully executed.⁷³ The supposed virtue of an ineffective commission is another way of saying that it is appropriate to evade a congressional mandate and reasonable for the executive to fail to execute the laws.

II. DELIBERATION AND DISSENT

Proponents of multimember commissions argue that this design structure improves deliberation and that dissents serve a valuable purpose in checking arbitrary action.⁷⁴ The idea that multimember commissions enhance

71. THE FEDERALIST NO. 51 (James Madison).

72. We say “often” here because even in cases in which the agency is not commanded to promulgate a specific regulation, it may be required to promulgate regulations under certain conditions. Consider, for example, the requirements under the Clean Air Act to regulate pollutants. The Act does not specify every particular pollutant but requires action when the scientific data trigger the statutory conditions. *See Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007).

73. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 10 (1994) (“It may be true that the Take Care Clause is a duty at least as much as it is a power; but the duty is the President’s, and as with any duty, it implies certain powers.”). For an overview of the clause and arguments about it, see Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016).

74. Datla & Revesz, *supra* note 11, at 794 (noting that the “slowness inherent in group

deliberation values has a few components. First, some commentators suggest that commissions will deliberate, learn from their discussions, and reach a consensus or moderate position.⁷⁵ Others note that diverse commissions will have a wider range of views, meaning that decisions will be better informed and more accurate.⁷⁶ Second, proponents argue that commissions offer a variety of mechanisms for agency accountability—particularly around the value of written dissents.⁷⁷ They argue that dissenters put pressure on the majority to write better decisions or change their views.⁷⁸ Dissents are also a form of pulling a “fire alarm” to warn Congress, courts, or the general public about agency malfeasance.⁷⁹ In addition, they allow presidents and members of Congress to better evaluate commissioner behavior.⁸⁰

action” results in a more deliberative decisionmaking process) (quoting MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 70 (1955)); see also Bar-kow, *supra* note 11, at 37 (noting that “a single head also means less deliberation and debate”).

75. SELIN & LEWIS, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES*, *supra* note 30, at 53 (noting that policymakers might like commissions because they “require[] deliberation and may lead to decisions that are more moderate as commissioners compromise to reach agreement”); Verkuil, *supra* note 9, at 260–61 (“Collegial decisionmaking has far different purposes and effects from single (or executive) decisionmaking. It is meant to be consensual, reflective[,] and pluralistic. . . . They are more concerned with the values of fairness, acceptability[,] and accuracy than with the single dimension of efficiency.”); Brenden D. Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691, 712 (2013) (arguing that a commission, *inter alia*, “force[] the proponents of each course of action to articulate reasoned arguments supporting their view, which allows both sides to see the strengths and weaknesses of their positions, thus allowing them to reach an informed decision”).

76. Verkuil, *supra* note 9, at 261 (“[I]t promises greater accuracy (and thereby fairness) because of the dialectical nature of the deliberative process.”).

77. Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 589 (2017).

78. This can happen directly, because the majority is challenged by the dissent. See *id.* at 589. Or it can happen because the majority wants to improve its decision for fear of judicial review. *Id.* at 593 (noting that a court can hold an agency’s action arbitrary and capricious for failure to respond to dissenters’ comments). Professor Sharkey notes that agencies might provide more thorough explanations for their actions given the threat of congressional oversight, inspector general investigations, and judicial review. Catherine M. Sharkey, *State Farm “with Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1605, 1657–60 (2014). It is possible that the threat of dissenting commissioners could also push a majority to offer a more thorough explanation. But it is not clear *how* much more beyond the other oversight mechanisms.

79. Jacobs, *supra* note 77, at 578–79. The classic article on this point is Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

80. Jacobs, *supra* note 77, at 576.

We do not disagree that these are potential benefits of commissions, but we do think that they are overvalued and that the costs are undervalued. To compare single-director agencies and multimember commissions, we need to account for the administrative process baseline that applies to both with respect to deliberation, information, and accountability. Even if multimember commissions have some benefits in this regard, what matters is the marginal benefit above and beyond single-director agencies. We think that benefit is relatively limited, given administrative process checks and the chilling effects of government-in-sunshine laws.

We are also particularly puzzled by arguments that the inefficiency of multimember commissions are desirable because single-director agencies are “subject to the whims and idiosyncratic views of a single individual.”⁸¹ This argument makes little sense because the baseline of administrative law checks prevents such an outcome; to the extent it does not, both types of agencies could suffer from one person’s pursuit of his or her “whims.” We also think that whatever the marginal benefits that might come from the ideal-type of a public-spirited multimember commission, these benefits must be further reduced in light of severe political polarization. We should expect the informational and signaling value of dissents in particular to be of far less value when it is unclear whether they are motivated by partisan ideology.

A. *The Administrative Process Baseline*

To evaluate the argument that multimember commissions offer deliberation and accountability virtues, it is helpful to separate two different kinds of policy choices, which we term expert choices and political choices. Expert choices include considering the merits and demerits of a particular policy, including scientific evidence and data; in essence, it involves the exercise of the agency’s policy expertise. Political choices instead focus on policy or values. While there is obviously no clean distinction between what is an “expert choice” and what is “political choice,”⁸² the distinction is helpful for clarifying the claims regarding deliberation and dissent.

To the extent that proponents of multimember commissions think commissions are significantly “better” at expert deliberation than single-director agencies, it is not clear why that is the case given the baseline under administrative law. Take the rulemaking process, as an example. The APA requires both single-director agencies and multimember commissions to go

81. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 184 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (quoting Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 *YALE L.J.* 2216, 2260 (2012)).

82. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 *COLUM. L. REV.* 1613, 1628 (1995).

through an intense decisionmaking process when drafting new rules. Under the notice-and-comment process, the agency must give notice to the public of a proposed rule, provide an opportunity for interested persons to submit written comments on the rule, and respond to all “significant comments that cast doubt on the reasonableness of the rule the agency adopts.”⁸³

The familiar arbitrary and capricious standard also forces both types of agencies to explain how they achieved their policy outcome.⁸⁴ Agencies must offer a reasoned explanation for their decisions, including evaluating different alternatives, responding to comments, and assessing the data.⁸⁵ This requirement is not trivial; courts frequently invalidate regulations when agencies fail to respond to significant comments.⁸⁶ This process not only provides any parties that oppose the regulation (whether politicians, industry representatives, or concerned citizens) with an avenue to voice concerns, but it also ensures that the agency actually addresses every major concern in the final rule. This naturally forces internal and external debate about a rule’s advantages and disadvantages—and it happens regardless of whether an agency is led by a single-director or multimember commission.

Additional deliberations even occur outside the notice-and-comment process. For example, agencies often meet with industry stakeholders, consumer groups, politicians, and other advocates during the notice-and-comment process, and they do so even prior to the issuance of a proposed rulemaking.⁸⁷

83. *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987) (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)); see also Administrative Procedure Act (APA), 5 U.S.C. § 553 (2012); Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 263–64 (2016).

84. 5 U.S.C. § 706(2)(A).

85. *Motor Vehicles Mfrs. Ass’n v. State Farm Ins. Co.*, 463 U.S. 29, 34 (1983).

86. See, e.g., *Sierra Club v. EPA*, 863 F.3d 834, 839 (D.C. Cir. 2017) (remanding a rule for further consideration when the EPA did not respond to certain comments adequately); *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312–14 (D.C. Cir. 2014) (remanding a rule for further consideration when the agency did not sufficiently address plaintiff’s concerns); *Am. Coll. of Emergency Physicians v. Price*, 264 F. Supp. 3d 89, 94–95 (D.D.C. 2017) (remanding a rule for further consideration when the agencies involved failed to respond to “actual concerns raised” and “ignore[d] altogether the proposed alternative” provided in comments).

87. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) (“To secure the genuine reality, rather than a formal show, of public participation, a variety of techniques is available—from informal meetings with trade associations and other constituency groups, to roundtables, to floating ‘trial balloons’ in speeches or leaks to the trade press, to the more formal techniques of advisory committees and negotiated rulemaking.”); Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the*

In addition, many agencies have deliberation-forcing mechanisms in the form of advisory boards. For example, the CFPB must consult a Consumer Advisory Board;⁸⁸ the Department of Energy has a Health and Environmental Research Advisory Committee;⁸⁹ and the Department of Agriculture confers with the National Advisory Committee on Microbiological Criteria for Foods.⁹⁰ For these reasons, expert deliberations are not something that is confined to commissions. Both types of agency are required to follow a deliberative rulemaking process by law.

Given that both are required to consider comments from a diverse set of interest groups, stakeholders, and the general public, and that agency explanations operate in the shadow of arbitrary and capricious review, we think the baseline that facilitates expert outcomes is far from trivial. We are thus skeptical of the argument that the marginal benefits to expert deliberations from having a multimember commission are so significant as to outweigh the drawbacks of such a design.

Proponents of multimember commissions also claim that dissenting commissioners serve to sound the “fire alarm” when the agency “goes too far in one direction.”⁹¹ Dissenting commissioners therefore help reduce the monitoring problem between principals (Congress) and agents (the

“*Hard Look*,” 92 NOTRE DAME L. REV. 331, 378 (2016) (noting that “agencies . . . do most of their real work of policymaking before notice and comment formally begins”); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1367–68 (2010) (“At the very least, these pre-Notice of Proposed Rulemaking (pre-NPRM) discussions will educate the agency about difficult technical issues and provide it with a means of anticipating and addressing these issues in the proposed rule without being caught off-guard. At most, engaging stakeholders in the development of a proposed rule may get their buy-in, making them less inclined to undo the proposed rule by filing material comments later in the process.”).

88. Bureau of Consumer Fin. Protection, *Charter of the Bureau’s Consumer Advisory Board 1* (Sept. 11, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcftp_cab_charter-amendment_2018.pdf.

89. U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-328, FEDERAL ADVISORY COMMITTEES: ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE AND BALANCE 14 (2004), <https://www.gao.gov/assets/250/242039.pdf> [hereinafter GAO-04-328] (noting that this led to, among other things, the Human Genome Project).

90. GAO-04-328, *supra* note 89, at 67. For a list of more advisory boards and commissions, see *Boards, Commissions, and Committees*, USA.GOV, <https://web.archive.org/web/20190612204408/https://www.usa.gov/boards-commissions-committees> (last visited Oct. 12, 2019).

91. For a succinct encapsulation of this possibility, see, e.g., Barkow, *supra* note 11, at 41 (“[W]hen an agency is composed of members of different parties, it has a built-in monitoring system for interests on both sides . . . [and is] more likely to produce a dissent if the agency goes too far in one direction.”). See also McCubbins & Schwartz, *Congressional Oversight Overlooked*, *supra* note 79, at 166.

agency).⁹² But for the “fire alarm” theory to carry the weight of the case for multimember commissions, it must be compared against the oversight mechanisms for single-director agencies. The claim must be that the marginal increase in oversight from dissents is significant enough to warrant multimember commissions (either on its own or in conjunction with other marginal benefits).

First, as an abstract matter, it is unclear how much additional value commissioner dissents offer. Commission dissents are not the only way in which “fire alarms” are pulled. Congress and the general public can find out about agency malfeasance from inspector general inquiries, journalistic investigations, and discontented interest groups.⁹³ Second, some commentators suggest that Congress is more likely to act (through an oversight hearing or a review of a rule, for example) when an agency has taken some action, rather than when an agency has failed to act.⁹⁴ Dissents necessarily will take place only in cases of agency actions, not failures to act, and accordingly they are less valuable in these latter situations.⁹⁵ If we take seriously the political science literature on asymmetric polarization—and couple that with the ideological preference of conservatives against regulation—we should expect that Republicans will be more likely to fail

92. Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–35 (1989); see also Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244–45 (1987).

93. See generally PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993) (explaining the role of federal inspectors general in agency investigations); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013) (arguing inspectors general play a significant role in monitoring national security practices affecting individual rights); David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 581 n.64 (2016) (noting that “EPA’s Office of Inspector General (“OIG”) has criticized EPA’s oversight mechanisms to prevent the submission of fraudulent data by external laboratories with which it contracts to provide environmental testing data”); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1110 (2017) (stating that “the use of FOIA by citizens, interest groups, and journalists contributes—along with leaking and whistleblowing—to fire alarm oversight by exposing agency behaviors that might not otherwise have piqued legislative interest”); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and A New Oversight Regime*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 199, 203–04 (2009) (“Under [the fire alarm] approach, Congress relies on interested third parties (typically, citizens, organizations, firms, or interest groups) who claim to have identified some regulatory problem and alert either members of Congress or other government officials.”).

94. Kagan, *supra* note 64, at 2260.

95. By failures to act, of course, we mean genuine inaction, not denials of rulemaking petitions, which are themselves an action.

to act than Democrats.⁹⁶ The result is that the dissent mechanism will be systematically less valuable during Republican administrations, simply because Democrats will have fewer opportunities to dissent. In both multi-member commissions and single-director agencies during those administrations, Congress, journalists, interest groups, and the general public will have to rely on leaks rather than published dissents to find out about omissions or other forms of malfeasance from inaction.⁹⁷ It is also worth pointing out that this asymmetry has a deregulatory bias that undervalues the liberty interests on both sides of regulation. But our central point is that the marginal benefit of a dissent as a “fire alarm” mechanism may not be as significant as some assume, given alternative channels for “fire alarms” and significant periods of regulatory inaction.

Defenders of multimember commissions also argue that commissions prevent the “whims” of a single director from defining policy. The implication is that single-director agencies are more likely to be arbitrary or oppressive (akin to the claim of the safeguards of liberty fallacy) or that they will exercise poor decisionmaking and judgment. “A multimember independent agency can go only as far as the middle vote is willing to go,” then-Judge Kavanaugh wrote.⁹⁸ “Conversely, under a single-Director structure, an agency’s policy goals ‘will be subject to the whims and idiosyncratic views of a single individual.’”⁹⁹

We find this argument puzzling and are not sure why this is a serious concern. First, a single director’s “whims” would by definition be an arbitrary and capricious action because “whims” do not satisfy the need for even a barely rational action with a reasoned justification. Second, to the extent that “whims” simply means the idiosyncratic views of a single person, there is no evidence that the “whims” of an independent single director are any flimsier or more idiosyncratic than are the whims of the middle vote on an independent commission. In either case, there is a single individual whose views can determine the fate of a particular agency action. A middle-vote commissioner would need to get two other votes to accomplish a particular task, but as the decisive vote, she would have considerable power to shape an outcome. Moreover, many commissions have moved toward increasing power to the chair on discretionary issues, particularly related to agency

96. See McCarty, *supra* note 49 (discussing the effects of political polarization on policy).

97. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 518 (2013).

98. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 184 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (quoting Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2260 (2012)).

99. *Id.* at 184.

management.¹⁰⁰ In these cases, the chair's whims would seem not so different from the whims of a single director.

Proponents of multimember commissions might simply fear that a single director can more easily assert her political preferences than can anyone in a multimember commission. To some extent, this is obviously true simply because a single director (unlike, for example, a chair of a commission) need not hold a vote before acting. But this is a feature—not a bug—of the design, and it is far from clear why this should be described with the negative connotation of “whims.” Single-director agency heads are appointed by the President and reflect the views of the President.¹⁰¹ What critics claim to be the “whims” on this theory are often the policy preferences of the President. Because critics referring to a rogue agency director's “whims” fail to point to specific examples, it is hard to pin down what situations they are contemplating. It often seems that the concern about “whims” is simply animated by objections to the underlying policies.¹⁰²

Indeed, there are not many examples of directors “going rogue” to accomplish some personal mission. And when this occurs, or when a president is unhappy with a director's performance for other reasons, the director can be removed. For example, President Clinton fired Federal Bureau of

100. Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 360 (2010) (“Chairs may exercise power via alternative channels to voting, such as supervisory authority over staff, agenda control, oversight over expenditures, and the power to represent the Commission publicly.”); Vermeule, *Conventions of Agency Independence*, *supra* note 19, at 1214 (noting that “chairs typically wield important agenda-setting powers”).

101. See generally David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001) (discussing presidential responsiveness and accountability in federal agencies).

102. See, e.g., Alden Abbott, *Time to Get Rid of the Consumer Financial Protection Bureau*, HERITAGE FOUND. (Feb. 17, 2016), <https://www.heritage.org/economic-and-property-rights/commentary/time-get-rid-the-consumer-financial-protection-bureau> (“In the case of the CFPB, the rule of law is being supplanted by regulatory whim, producing deep uncertainty in the consumer financial market.”); Wen Fa, *‘No More Kings:’ The Supreme Court Must Rein in the CFPB*, WASH. EXAMINER (Mar. 26, 2018, 3:41 PM), <https://www.washingtonexaminer.com/opinion/op-eds/no-more-kings-the-supreme-court-must-rein-in-the-cfpb> (“Worse, the CFPB director enforces these laws as his whim dictates. Although the director's decisions can cripple the American economy, the director's office shields him from suffering any of the consequences himself. He answers to no one.”); Trey Garrison, *Senator Perdue: Rogue CFPB Creates New Rules and Regulations at Whim*, HOUSINGWIRE (May 19, 2015), <https://www.housingwire.com/articles/33939-senator-perdue-rogue-cfpb-creates-new-rules-and-regulations-at-whim> (quoting Senator David Perdue) (“Right now, the CFPB is a rogue agency that dishes out malicious financial policy and creates new rules and regulations at whim without real Congressional oversight.”).

Investigation (FBI) Director William Sessions in 1993 over ethics violations,¹⁰³ and President Obama fired General Stanley McChrystal for conduct that “undermine[d] the civilian control of the military that is at the core of our democratic system.”¹⁰⁴ The President can also terminate the heads of independent agencies under statutory for-cause removal provisions. As Judge Griffith has noted, this applies even to independent single-director agency heads, like the director of the CFPB.¹⁰⁵

B. *Sunshine Laws and the Chilling of Deliberation*

There is another reason to be skeptical of the argument that Commissions offer considerable deliberative benefits. There are a number of federal statutes focused on transparency in government—and in particular the Government in Sunshine Act¹⁰⁶ (Sunshine Act)—that have the unintended consequence of chilling the deliberative process. The Sunshine Act requires commissions to hold open meetings in all but a few circumstances.¹⁰⁷ It applies to any meeting of a quorum of commissioners; in other words, if an agency has a five-member commission, the Act applies to substantive deliberations or discussions between three or more commissioners. The Sunshine Act, and laws like it,¹⁰⁸ “aim[] to prevent well-heeled insiders, especially industry groups, from exercising undue influence over those bodies—and consequently to enhance the fairness, the deliberativeness, and . . . the public interestedness of their work.”¹⁰⁹

But even policies with good intentions can have unintended consequences. As a former General Counsel to the FTC has explained, the Sunshine Act can reduce “collegial decisionmaking.”¹¹⁰ In the context of drafting

103. See Philip Bump, *Here’s How Unusual It Is for an FBI Director to Be Fired*, WASH. POST (May 9, 2017), https://www.washingtonpost.com/news/politics/wp/2017/05/09/heres-how-unusual-it-is-for-an-fbi-director-to-be-fired/?utm_term=.46cf696c25ed; Robert Chesney, *Background: The Power to Appoint & Remove the FBI Director*, LAWFARE (May 10, 2017, 11:55 AM), <https://www.lawfareblog.com/backgrounder-power-appoint-remove-fbi-director>.

104. Noah Shachtman, *Why Obama Had to Fire McChrystal*, WIRED (June 23, 2010, 1:30 PM), <https://www.wired.com/2010/06/obama-had-to-do-it> (quoting President Barack Obama).

105. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 131 (D.C. Cir. 2018).

106. 5 U.S.C. § 552b (2012).

107. The statute does provide for a few exceptions, related to, *inter alia*, national defense, trade secrets, and legal proceedings. *Id.*

108. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2012).

109. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 120 (2018).

110. Stephen Calkins, Former Gen. Counsel, The Sunshine Act: Administrative Conference of the United States, Speech Before Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995), <https://www.ftc.gov/public-statements/1995/09/sunshine-act-administrative-conference-united-states>.

adjudicative opinions, for example, “[e]ven after commissioners have voted on the matter at a formal meeting,” the Sunshine Act “prevents commissioners from engaging in such informal discussions on a draft opinion[’]s language.”¹¹¹ He elaborated:

Collegial decisionmaking is a gradual process, requiring identification of issues, consideration of a variety of approaches to each issue, and discussion of the possibility of accommodating divergent views in order to achieve a consensus. This often may not happen in a single meeting, or even in two. Prohibiting the development and reconsideration of positions on pending issues except in formal meetings accompanied by the full panoply of statutory procedural requirements necessarily results in either a plethora of formal meetings or a substantial decrease in useful discussion without a corresponding gain in openness.¹¹²

In short, by forcing discussions among a quorum of commissioners to be held in public, the Sunshine Act impedes, rather than enhances, deliberation. And as a result, commissioners “often make important decisions through notational voting with no prior deliberation.”¹¹³ The conversations at open meetings are “grossly distorted,’ marked by ‘stilted and contrived discussions.”¹¹⁴

Or consider an example offered by a former acting chairman of the CPSC. The CPSC discovered that over the course of one year, there were 56,500 injuries and thirteen deaths associated with chainsaws in the United States.¹¹⁵ The CPSC undertook an effort to remedy the issue with a voluntary safety standard. It held meetings over eighteen months in a “fish-bowl” environment, in accordance with the Sunshine Act.¹¹⁶ The acting chair concluded that “[t]he effort ended in frustration.”¹¹⁷ He blamed this on the public posturing and lack of candor. “In short, what might have been said and accomplished in the privacy of a closed meeting was never said, never discussed,” resulting in a two-year delay and tens of thousands of additional injuries.¹¹⁸

A Special Committee appointed by the Chair of the Administrative Conference of the United States found that the Sunshine Act’s “‘open meeting’

111. *Id.*

112. *Id.*

113. Pozen, *supra* note 109, at 128.

114. *Id.* at 129 (quoting RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.18, at 392 (5th ed. 2010)).

115. Stuart M. Statler, *Too Much ‘Sunshine’ in Government Can Hurt*, WASH. POST (May 10, 1981), https://www.washingtonpost.com/archive/opinions/1981/05/10/too-much-sunshine-in-government-can-hurt/11d1fa9c-4c1f-4625-8394-47b97277731e/?noredirect=on&utm_term=.73fb8948c528.

116. *Id.*

117. *Id.*

118. *Id.*

requirement curtails meaningful collective deliberation and substantive exchange of ideas among agency members. Rather than actual, collective deliberation in public, agency members often use the open meeting merely to announce and explain their positions.”¹¹⁹ In studying the issue, the Special Committee determined that commissioners were—understandably—hesitant to express initial views in the public eye.¹²⁰ Commissioners become concerned with creating uncertainty or confusion as they themselves worked out a particular issue, embarrassing themselves or another commissioner, or harming the agency’s litigation position in a number of ways.¹²¹ In arguing that more deliberations should occur out of the public eye, one commentator notes: “Frustration of the exchange of collective wisdom among peers would cripple an appellate court’s candid exchange of views in oral debates of controversial cases The same principle applies to administrative agency decisionmaking.”¹²² As we explain throughout this Essay, commissioners have many reasons to engage in political posturing; the Sunshine Act is yet another factor that contributes to this dynamic.

Government transparency laws are important—but they diminish the argument that the supposedly deliberative benefits of multimember commissions are significant enough to offset the costs of that design, vis-à-vis single-director agencies.¹²³

C. *Partisan Polarization, Deliberation, and Dissent*

Whatever marginal benefits there are from multimember commissions regarding both deliberation and dissent are also likely to be further reduced

119. Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 416 (1997); see also DAVID M. WELBORN, WILLIAM LYONS & LARRY THOMAS, IMPLEMENTATION AND EFFECTS OF THE FEDERAL GOVERNMENT IN THE SUNSHINE ACT, ADMIN. CONF. OF THE U.S. 228–29 (1984), <https://www.acus.gov/sites/default/files/documents/1984-03%20Implementation%20and%20Effects%20of%20the%20Federal%20Government%20in%20the%20Sunshine%20Act.pdf>.

120. May, *supra* note 119, at 416–17.

121. *Id.* The Special Committee ultimately recommended that Congress authorize a pilot program in which agencies allow members to meet in private without advanced public notice, as long as the meetings were memorialized in a public detailed summary within five days. *Id.* at 417.

122. James T. O’Reilly & Gracia M. Berg, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission*, 36 HARV. INT’L L.J. 425, 460 (1995).

123. Further, an analysis of state sunshine laws demonstrated that in jurisdictions with more exemptions (i.e., in jurisdictions in which private meetings are more easily held), “neither public corruption, government abuse, nor public confidence in government is notably worse than in the minority of states with little to no categorical statutory exemptions.” Steven J. Mulroy, *Sunlight’s Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 359 (2011).

given partisan polarization. In recent years, political scientists have shown that political polarization is deepening.¹²⁴ Polarization is also asymmetric, meaning that Republicans have gone further to the extreme than Democrats have. Legal scholars have accounted for partisanship dynamics in a variety of areas within public law,¹²⁵ and this phenomenon must also be factored into a choice between multimember commissions and single-director agencies.¹²⁶

Start with deliberation. The case for multimember commissions is that a diverse group of individuals coming to a decision will be more likely to compromise and find moderate policies or, in other formulations, will reach more accurate conclusions.¹²⁷ Foremost, it is not always clear that commissions will have diverse memberships. For example, when commissions can meet their quorum requirement but simultaneously have vacancies (as they often do), scholars have noted that this has “the effect of shifting power to the hands of individual agency members . . . with a potential reduction in collegial accountability”¹²⁸ In the absence of a statutory requirement to the contrary, a five-person agency with a three-person quorum can make decisions on a 2–1 basis or even a 3–0 basis—potentially undermining the existence of ideological diversity among the members.¹²⁹

Second, the argument that deliberation will lead to more accurate policy is, at least in some agency decisionmaking contexts, contrary to how traditional administrative law doctrines are understood. Under the *Chevron* doctrine,¹³⁰ for example, the agency has space—within authorized limits—to make a policy determination.¹³¹ *Chevron* applies when the statutory text is

124. See *supra* text accompanying note 49.

125. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (discussing the relationship between parties and separation of powers); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (discussing the relationship between parties and federalism); Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159 (2014) (arguing that the United States is in a period of political and constitutional transition similar to the transition it underwent in the late 1970s); Fishkin & Pozen, *supra* note 49, 929–35 (analyzing the polarization of the two party system within the United States).

126. It is worth noting that these dynamics will apply differently in different types of multimember commissions. Some might have partisan balance requirements, and thus feature an extreme version of partisan consequences. Others might not, but the individuals might still be partisans given compromises in the appointments process.

127. See *supra* notes 71–72.

128. MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 324 (2015).

129. *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183–84 (1967).

130. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 837 (1984).

131. Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and*

ambiguous.¹³² It makes little sense, then, to justify a multimember commission on grounds of “accuracy.” The doctrine recognizes that there is not a single “correct” answer to the interpretive question; rather, there are a range of permissible interpretations. And if the decision is ultimately a policy choice, then the case for a single-director agency, with accountability through the President, remains a strong one.¹³³

More importantly, it is not clear that deliberation leading to compromise is likely to occur in a fiercely partisan environment. On the question of compromise solutions, there is social psychology literature that suggests that when ideological homogeneous groups deliberate, their members move toward an ideologically extreme position.¹³⁴ The implication is that ideologically diverse groups of people have the opposite effect. Indeed, there are studies of three-judge federal court of appeals panels that have found that politically heterogeneous panels are more moderate in their outcomes,¹³⁵ and scholars have used this finding to argue that diverse commissions will be less polarized.¹³⁶ But at the same time, more recent and more extensive studies have found that the diversity of federal court of appeals panels do not have any significant effect on the application of *Chevron* deference.¹³⁷ And some recent studies have shown that exposure to alternative ideological views on social media actually deepens political polarization.¹³⁸

“Skidmore *Weight*,” 112 COLUM. L. REV. 1143, 1143 (2012).

132. *Id.* at 1168.

133. Kagan, *supra* note 64, at 2331–32 (discussing agency accountability via the president).

134. Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J.L. ANALYSIS 263, 263–64, 268–70 (2009) (finding pervasive evidence of group polarization on issues regarding politics and political behavior).

135. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158–59 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 863–65 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 329–38 (2004).

136. Barkow, *supra* note 11, at 40–41 (noting that “[a]s a wealth of empirical research demonstrates, a group composed solely of ideologically like-minded people tends toward extreme decisionmaking” and suggesting that a “commission of five members all of the same party would be even more polarized than one in which a bare majority is of the same party”).

137. Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1523–24 (2018). They also find, notably, that conservative and liberal panels are more likely to agree with agency interpretations that align with their ideological valence. *Id.* at 1468.

138. Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 PROCEEDINGS OF THE NAT’L ACADEMY OF SCI. OF THE UNITED STATES OF

Given the conflicting data in these analogous areas, it is not clear that ideological diversity among commissioners will have a moderating influence. In fact, we might actually expect multimember commissioners to be even less likely to moderate their opinions than judges. First, new empirical research on commissions with partisan balance requirements shows that commissioners have become more partisan since the 1990s, which might mean that they will be less likely than earlier “partisans” to moderate their views.¹³⁹ As Professors David Lewis and Neal Devins have noted, “today’s opposition-party commissioners are ideological partisans committed to the agenda of the opposition party.”¹⁴⁰ Although increased partisanship could in theory support the deliberation and moderation hypothesis, it could also support a polarization hypothesis.¹⁴¹ Second, commissioners are increasingly drawn from the pool of congressional staffers, and scholars have suggested that this makes them more likely to bring partisan and political sensibilities to the position than those who are not drawn from the combative culture of Congress.¹⁴² Third, in a partisan political environment, we might expect commissioners to move to the fringes in order to curry favor with co-partisans in Congress and the Executive Branch who could support their ambitions for future positions in government.¹⁴³ Fourth, where commissioners hire their own staffs, we might expect them to hire co-partisans that produce partisan analyses, contributing further to fracturing along party lines.¹⁴⁴ In any case, our point

AMERICA 9216, 9217–18 (Sept. 2018) (finding Republicans exhibited substantially more conservative views posttreatment, while Democrats exhibited slightly more liberal views).

139. The most recent is Feinstein & Hemel, *supra* note 15, at 81–82. See also Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 35, (Berkeley Elec. Press, Working Paper No. 73, 2007), <http://law.bepress.com/cgi/viewcontent.cgi?article=2219&context=alea> (“[T]here is evidence that cross-party appointees post-1980 have been even more extreme than party-line appointees.”).

140. Devins & Lewis, *supra* note 65, at 461.

141. See Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2228 (2009) (observing that in a partisan commission setting, “[p]erhaps both Republican and Democratic appointees would conceive of themselves, to a somewhat greater degree, as political partisans, simply because the requirement of mixed composition would suggest as much”).

142. Brian D. Feinstein & M. Todd Henderson, *Pathways of Power: The Rise of Hill Staffers-Turned-Commissioners*, 60 (Univ. of Chicago, Public Law Working Paper No. 703, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338092.

143. For example, it is unclear that Ajit Pai would have been elevated to Chairman of the FCC without his notable dissents that staked out partisan positions on net neutrality and other issues. See Ali Breland, *Republican Ajit Pai Named New FCC Chairman*, HILL (Jan. 23, 2017), <https://thehill.com/policy/technology/315746-trump-taps-pai-as-new-fcc-chairman>.

144. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of*

is simply that we are not aware of any studies that confirm either approach and so cannot conclude that multimember commissions are better on this account of deliberation.

But we do have reason to suspect that polarized multimember commissions will not be successful at reaching moderate compromises. There has long existed a multimember commission in which polarized, partisan views on regulatory policy have been salient: The Federal Election Commission (FEC). Because of its political content and because it has an equal number of Democratic and Republican commissioners, the FEC is “often deadlocked.”¹⁴⁵ As the D.C. Circuit put it in 2016, the FEC’s “voting and membership requirements mean that, unlike other agencies—where deadlocks are rather atypical—FEC will regularly deadlock as part of its modus operandi.”¹⁴⁶ As a result, former and current commissioners have publicly undermined colleagues and the commission in an effort to draw attention to the Agency’s dysfunction.¹⁴⁷ Senator John McCain once referred to it as the “little agency that can’t.”¹⁴⁸ The *New York Times*’ Editorial Board noted that “most campaign professionals treat the F.E.C. as an impotent joke” and that it is “paralyzed.”¹⁴⁹ On a theory of deliberation in groups, one might expect the FEC to come to compromises. But instead the combination of

Independent Federal Agencies, 52 ADMIN. L. REV. 1111, 1168 (2000) (noting that commissioners hire their own staff).

145. Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1380 (2017); see also *id.* at 1456–57 (detailing the Federal Election Commission’s (FEC’s) dysfunction). For examples of cases resulting from FEC deadlocks, see Citizens for Responsibility & Ethics in Washington v. FEC, 892 F.3d 434, 437 (D.C. Cir. 2018); Common Cause v. FEC, 842 F.2d 436, 438 (D.C. Cir. 1988); and Campaign Legal Ctr. v. FEC, 312 F. Supp. 3d 153, 158 (D.D.C. 2018).

146. Pub. Citizen, Inc. v. FERC, 839 F.3d 1165, 1171 (D.C. Cir. 2016).

147. Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1421 (2018); see also, e.g., Trevor Potter, Symposium, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission’s Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 447–48, 450 (2017); Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html?smid=pl-share>; Ellen L. Weintraub, *Opinion, Trump’s Pick for White House Counsel Is Wrong for the Job*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/opinions/i-worked-with-trumps-pick-for-white-house-counsel-he-doesnt-care-about-corruption/2016/12/09/76f0793c-bcac-11e6-94ac-3d324840106c_story.html?utm_term=.782ff1ef28a9.

148. Melanie Sloan, *No Vote of Confidence for the FEC*, POLITICO (Apr. 30, 2013, 9:42 PM), <https://www.politico.com/story/2013/04/no-vote-of-confidence-for-fec-090783>.

149. Editorial Bd., *The Feckless F.E.C., Rebuked*, N.Y. TIMES (Sept. 23, 2016), <https://www.nytimes.com/2016/09/24/opinion/the-feckless-fec-rebuked.html?smid=pl-share>.

partisanship and an equal number of partisans on each side has led to deadlocks. While an FEC with a partisan majority would probably not deadlock, given its history, it is hard to imagine that a polarized partisan majority would compromise with the minority instead of simply outvoting them.

The consequence of increasing partisanship on the value of dissents is also unclear. With heightened partisanship, we should expect that minority commissioners will dissent frequently, thereby activating the “fire alarm” mechanism.¹⁵⁰ But what value do these dissents have? The literature suggests a dissent serves as a warning of possible agency malfeasance. But in a partisan environment, the signal is extremely noisy because the minority commissioners may simply disagree with the policy on political or ideological grounds. For members of Congress or the general public seeking to conduct bona fide oversight, minority dissents have an element of the boy who cried wolf. They might sometimes be accurate signals of looming danger, but also might simply be false alarms.

Indeed, data confirms that dissents are a noisy signal. Using the Federal Communications Commission (FCC) as a test case, Adam Candeub and Eric Hunnicutt studied how partisanship intersects with commission dissents. Their conclusion: “partisanship does play a fairly large role in voting behavior.”¹⁵¹ In general, dissents are much more common from minority commissioners than majority commissioners; in Hunnicutt and Candeub’s study, 67% of dissents are made by commissioners belonging to the opposite party as the chair, while the FCC “Chair concurs-in-part, concurs, dissent[s]-in-part, or dissents only 119 times out of 9,279 orders” (i.e., approximately 1.28% of the time).¹⁵² They maintain that minority commissioners are willing to dissent because there is “no perceived downside” for them, as opposed to a commissioner in the majority party.¹⁵³

Further, commissioners seem to dissent when there is a perceived upside: a high likelihood of convincing a D.C. Circuit panel or Congress that the agency action is ill-advised.¹⁵⁴ Hunnicutt and Candeub’s empirical analysis

150. Cf. Feinstein and Hemel, *supra* note 15, at 74–75 (discussing the fire alarms argument and noting that partisans will plausibly pull such alarms).

151. Adam Candeub & Eric Hunnicutt, *Political Control of Independent Agencies: Evidence from the FCC* 9 (July 16, 2010) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640285.

152. Candeub & Hunnicutt, *supra* note 151, at 3–5.

153. Jacobs, *supra* note 78, at 571.

154. Additionally, another perceived upside may contribute to a commissioner’s willingness to dissent—the commissioner’s self-interest. A minority commissioner who, for example, is eager to be elevated when his or her party is next in power may see a dissent as an opportunity to raise his or her own profile. This separate reason for a dissent is also political, and thus undermines the integrity of agency action.

also shows that the number of commissioner dissents increases with the percentage of D.C. Circuit judges appointed by a President who is of the opposite party of the FCC Chair.¹⁵⁵ In other words, if the FCC Chair is a Democrat, the likelihood of a Republican commissioner dissenting grows as the number of Republican-appointed D.C. Circuit judges grows. Candeub and Hunnicutt point out that:

[a] possible reason for this correlation is that Commissioners signal to the court that they think this is a weak/bad/etc. order that should be vacated or remanded. Another possible explanation is that commissioners are signaling to parties and interests who would like to appeal the order, and commissioners are more willing to expend the internal social capital when such an appeal would be most fruitful.¹⁵⁶

In addition, they found that the likelihood of a minority commissioner dissent grows when there is divided government (i.e., either the House or the Senate is controlled by the party that is not the President's and, thus, not the commission Chair's party).¹⁵⁷ This may be interpreted similarly: A commissioner is more likely to dissent when she knows it could signal to one or both houses of Congress that they should intervene to stop the agency action.

But dissents do more than flag potential partisan issues for a panel of judges. They also act as a roadmap for ideological judges who want to strike down those regulations. For example, courts can use dissents to invalidate the majority position as arbitrary and capricious.¹⁵⁸ When the majority does not engage with a point raised by the dissent, a court can overturn the agency action as arbitrary and capricious. And of course, whether a response to a dissent is adequate is subjective—panels frequently disagree about the adequacy of responses to comments and dissents. This leaves additional room for partisan decisionmaking, and it encourages an everything-but-the-kitchen-sink approach to dissents, in an effort to flag any and all items that could support an arbitrary and capricious ruling. This approach, of course, raises the cost of regulating and rulemaking as the majority endeavors to respond to any and all criticism, even those which are entirely hypothetical.

Consider a few examples. In 2014, the D.C. Circuit specifically cited the dissent of one Federal Energy Regulatory Commission (FERC) commissioner when it overturned a rule governing “demand response resources in

155. Candeub & Hunnicutt, *supra* note 151, at 4.

156. *Id.* at 9.

157. *Id.* at 3; *see also* Datla & Revesz, *supra* note 11, at 796 (“During periods of divided government, partisan-line voting increases and members in the minority dissent more.”).

158. Jacobs, *supra* note 78, at 591–92.

the wholesale energy market.”¹⁵⁹ Essentially, wholesale electricity suppliers can pay consumers to use less electricity during periods of high demand; FERC had required suppliers to pay the same price to those who conserved that they would pay to producers. The rule sought “to incentivize retail customers to reduce electricity consumption when economically efficient,” but the D.C. Circuit held that the rule “encroach[ed] on the states’ exclusive jurisdiction to regulate the retail market.”¹⁶⁰ In so ruling, the D.C. Circuit noted that the Commission majority “failed to properly consider—and engage—Commissioner Moeller’s reasonable (and persuasive) arguments [in his dissent], reiterating the concerns of Petitioners and other parties, that *Order 745* will result in unjust and discriminatory rates.”¹⁶¹ The court further explained that the Commission had not adequately addressed his concerns about overcompensation and how their preferred system “results in just compensation.”¹⁶² The case was decided by a three-judge panel—Judges Brown and Silberman, both Republican appointees, were in the majority; Judge Edwards, a Democratic appointee, dissented. In his dissent, Judge Edwards noted that FERC did, in fact, “provide a ‘direct response’ to the Petitioners’ and the dissenting Commissioner’s concerns about overcompensation.”¹⁶³ Simply put, the judges—already able to use the arbitrary and capricious standard to rule in a potentially partisan way—were given something to latch on to for additional evidence, even though it is not clear that the Commission did, in fact, respond inadequately to Commissioner Moeller. Indeed, the Supreme Court ultimately reversed the D.C. Circuit.¹⁶⁴

As another example, a panel of three Republican appointees overturned a Federal Labor Relations Authority (FLRA) decision that had set aside an arbitrator’s ruling that was favorable to the National Treasury Employees Union.¹⁶⁵ The Union sued, claiming that the Internal Revenue Service (IRS) had erred in refusing to award promised time off, and the FLRA found for the IRS. However, one FLRA member noted in dissent that the “arbitrator

159. *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216, 218 (D.C. Cir. 2014), *rev’d and remanded*, 136 S. Ct. 760 (2016) (as revised Jan. 28, 2016).

160. *Id.*

161. *Id.* at 225.

162. *Id.*

163. *Id.* at 237 (Edwards, J., dissenting).

164. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 773 (2016) (as revised Jan. 28, 2016). The majority there—comprised of Justices Kagan, Roberts, Kennedy, Ginsburg, Breyer, and Sotomayor—held that FERC had not acted arbitrarily or capriciously in promulgating the rule. Justices Scalia and Thomas dissented. (Justice Alito took no part in the consideration of the case.)

165. *Nat’l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 466 F.3d 1079, 1079 (D.C. Cir. 2006).

made no finding whether the agreements contemplated time-off awards when an employee's performance was less than minimally successful."¹⁶⁶ The D.C. Circuit used the dissent to support its assertion that the FLRA opinion was arbitrary and capricious.

These cases are just two examples of how dissents contribute to partisan decisionmaking when rules and adjudications are later challenged as arbitrary and capricious. The fact that partisan commission dissents might serve as a signal to co-partisan judges, members of Congress, and interest groups to oppose a regulation does not just diminish its benefits but also introduces serious costs. In particular, it means that an agency that is engaged in bona fide rulemaking to execute Congress's statutory mandates might be more likely to find itself in the crossfire of a partisan political battle. In other words, the politicization of dissent not only muddies the "fire alarm" signal but may also threaten legitimate rulemakings.

III. COMMISSIONS AND REGULATED PARTIES

In this Part, we consider the relationship between commissions and regulated entities. One possible argument for multimember commissions is that they were designed with adjudications in mind, in order to ensure fairness and due process to regulated entities. But this purpose is less persuasive as an ongoing justification for agency design, given shifts over time from adjudication to rulemaking as a policymaking form. Second, we consider arguments that commissions are more susceptible to capture by regulatory entities. While there is still much research to be done on this question, these arguments further weaken the case for commissions.

A. Adjudication, Rulemaking, and Agency Design

The conventional story of the origins of multimember commissions begins with the ICC.¹⁶⁷ The critical shift in the creation of the ICC was the locus of policymaking: From judicial evaluation of fair rates to administrative decision.¹⁶⁸ The ICC's primary work in its early years was determining whether a railroad rate was "unreasonable and unjust," and if it so determined, the ICC could "issue an order against" a railroad charging such rates.¹⁶⁹ In

166. *Id.* at 1081.

167. For a pre-Interstate Commerce Commission (ICC) history of administrative law, see MASHAW, *supra* note 24.

168. For an account of the legislative history, including competing proposals to accomplish regulated railroad rates through judicial action versus commission, see ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 40–44 (1941).

169. CUSHMAN, *supra* note 168, at 39. Later legislation gave the ICC the power to set rates.

addition, railroads themselves sometimes had opposing interests, so proponents saw the ICC as “an arbitral body” that could address these conflicts.¹⁷⁰ Because the ICC’s early work was thus effectively adjudicatory,¹⁷¹ the design of the commission involved “emulation of the appellate courts that allowed [it] . . . to gain the legitimacy necessary” to operate.¹⁷² As with courts, multimember commissions might be preferable when adjudicating claims because the decisions are heavily fact-specific, due process concerns are at issue, and consensual decisionmaking might lead to better outcomes.¹⁷³

The initial design of the FTC as a commission was also based on the assumption that much of its work would be “quasi-judicial” in nature because it issued cease-and-desist orders against unfair competition practices.¹⁷⁴ “[T]here are powers of judgment . . . to be exercised,” Senator Francis Newlands said in a 1911 hearing.¹⁷⁵ The Commissioner of Corporations, Herbert Knox Smith, similarly noted in a letter regarding the design of a new agency that if “judicial or semijudicial powers are to be exercised the commission form has important advantages; it is better adapted for judicial decision, its judicial rulings would probably carry more weight, and, in any event, it tends to secure stability, continuity of policy, and greater independence of action.”¹⁷⁶ Over the next generation, a wide variety of other agencies were also built on the ICC model: the Federal Radio Commission, FCC, NLRB, and others.¹⁷⁷

Today, many commissions and agencies rely on rulemaking rather than

Id. at 48 (describing the effect of the Hepburn Act of 1906 and the Mann-Elkins Act of 1910).

170. *Id.* at 49.

171. This is not to say that commissions were only involved in adjudicative-like activities. Many commissions—then and now—issued rules and regulations as well. See MASHAW, *supra* note 24, at 8–9, 13. It is also not to say that everyone thought they were “judicial” in nature. Indeed, legislative debates suggest that proponents of the ICC were agnostic on how the ICC’s powers were classified. *Id.* at 56–58.

172. Verkuil, *supra* note 9, at 261. To be sure, the multimember structure was the result partly of political compromise, policy experimentation, and other factors as well. See MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 56 (2015).

173. Verkuil, *supra* note 9, at 262.

174. CUSHMAN, *supra* note 168, at 187, 196, 210.

175. SENATE COMM. ON INTERSTATE COMMERCE, CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE, S. REP. NO. 66-1326, at 11 (1913) (statement of Sen. Newlands). Newlands also noted that “[o]f course, in performing any purely executive work one man is preferable to a commission.” *Id.*

176. *Id.* at 20.

177. On the various agencies created in the shape of the ICC, see BREGER & EDLES, *supra* note 128, at 36.

adjudication as the primary mechanism for making policy. There are strong arguments for this choice: Rulemakings allow agencies to consider policy across a variety of fact patterns, they provide *ex ante* notification to regulated parties of policies, they allow greater participation in policy determinations, and they are a far more efficient use of agency resources than adjudications.¹⁷⁸ This preference is not a new one. At least from the early twentieth century on, agencies discussed proposed rulemakings with regulated groups at conferences, created advisory committees, and held public hearings.¹⁷⁹ These practices were formalized into the APA in 1946 through procedures for formal and informal rulemaking.¹⁸⁰ And, while some agencies still rely heavily on adjudications, many prefer to establish policies through rules rather than through adjudications.¹⁸¹

The structural choice of a commission was important in the late 19th and early 20th century, when some of the most prominent commissions were primarily involved in quasi-judicial actions. Today, this design makes little sense in a context where agencies now use rulemaking as their primary mode of policymaking. The arguments for commissions—due process for a specific party and the desire for multiple people to consider the same fact-specific activity—are less compelling when the policymaking process is designed to establish more general regulatory policies and include all stakeholders and the general public. In this process, energetic execution of the process and clear lines of accountability for policy choices are highly desirable. As Paul Verkuil has noted, “[a]djudication and policymaking call for different skills and temperaments as well as different organizational mechanisms.”¹⁸²

It may even be that when agencies rely upon adjudications, the value of a multimember commission is not as strong as it could be. For example, FERC relies upon Administrative Law Judges (ALJs) for adjudications, but these judges are selected by the Chairman of FERC, not by the entire commission. While FERC might retain overall authority, the choice of ALJs is not trivial and is no different than if the agency were run by a single director.¹⁸³

178. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533–37 (2003); Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 480–94 (2003) (discussing the rise of rulemaking).

179. Kevin M. Stack, *Rulemaking Regimes in the Modern State*, in PETER CANE ET AL., *COMPARATIVE ADMINISTRATIVE LAW* (forthcoming 2020).

180. 5 U.S.C. § 553 (2012).

181. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384–85 (2004) (“[B]y the 1970s, a detectable shift had occurred and most administrative agencies pursued their mandates by promulgating legislative rules.”).

182. Verkuil, *supra* note 9, at 262.

183. 42 U.S.C. § 7171(c) (2012) (“The Chairman shall be responsible on behalf of the

This does not mean, however, that commissions are never useful. Our case against multimember commissions is, after all, a presumptive case, not a categorical one. Indeed, even the Brownlow Committee conceded in its report that it meant only to bring under presidential control “all work done by these independent commissions which is not judicial in nature.”¹⁸⁴ There currently exist design structures that follow something like this division. For example, the Occupational Safety and Health Administration (OSHA) uses rulemaking in order to set workplace safety standards. But when those standards are enforced, challenges come before the Occupational Safety and Health Review Commission (OSHRC)—a three-person independent commission.¹⁸⁵ As Senator Jacob Javitz once noted in debates over OSHA, an “independent Panel approach would . . . preserve due process more easily.”¹⁸⁶ This division guarantees energy and accountability in policymaking, while retaining the appellate-like multimember commission for reviewing case-by-case enforcement actions.

B. *Commissions and Capture*

Professor Jed Shugerman has recently argued that the origins of the ICC were not simply in political compromise and the delegation of technical questions to experts. Rather, Shugerman argues that as the country shifted away from the politics of patronage, Senators needed to gain access to special interest money and power—and the railroads were the central source of that power at the time. The ICC’s commission design, compared to the baseline of private civil litigation, gave Senators power and influence over nominations, which would in turn appeal to railroad interests. In essence, Shugerman argues that the origins of the ICC are, at least partly, in the Senate’s desire to gain favor (and financial benefits) from the railroad industry.¹⁸⁷

Since at least the time of the ICC, people have been concerned about commissions becoming captured by the industries they regulate. During debates over the ICC, for example, Representative Reagan wrote in a House

Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of title 5”).

184. Brownlow Committee Report, *supra* note 18, at 37.

185. Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 877 (1998); George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

186. BREGER & EDLES, *supra* note 128, at 95.

187. Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 139–40 (2015).

report that the Commission would be “more likely to represent the interests of the railroad companies than those of the general public.”¹⁸⁸ Representative Campbell declared that the ICC would be a “railway syndicate” and that its creation was the cession of public power to monopolies.¹⁸⁹ Shugerman’s revisionist history raises the question of whether commissions are more captured by regulated industries than single-director agencies.

Theoretically, it is unclear whether multimember commissions or single-director agencies might be more susceptible to industry capture, particularly because independence often goes with commissions and single-director agencies with political oversight. On the one hand, capturing the head of a single-director agency means complete industry influence over the agency. It might be easier to capture one person than many. On the other hand, because many commissions are independent, they face less presidential oversight.¹⁹⁰ Commissions also cover areas that require considerable technical expertise, and might have higher rates of its leaders coming from or going back to regulated industry after government service.¹⁹¹ It is also possible that if there are strong “iron triangle” relationships between congressional committees, regulated industry, and the agency, the agency might be more susceptible to industry influence via its closer connection to and oversight from Congress.¹⁹² Finally, commissions might suffer to a greater degree from “capture-induced agency inaction.”¹⁹³ That is, they might be susceptible to capture—not with respect to promulgating regulations but simply failing to regulate. This could be a function of their greater difficulty in acting swiftly or a function of asymmetric polarization.

While we cannot conclude definitively from these theoretical arguments that multimember commissions suffer from problems of industry capture to a greater degree than single-director agencies, there is empirical evidence to suggest that they might. In a recent study, Neal Devins and David Lewis surveyed approximately 3,500 federal government managers on a variety of questions related to their agency’s performance and functions. They found that those working in independent regulatory commissions reported, at higher rates than other agencies, that their commissions suffer from “a good

188. CUSHMAN, *supra* note 168, at 52–53.

189. *Id.*

190. Neal Devins & David E. Lewis, *Rethinking Independent Agencies* (draft on file with the authors).

191. *Id.*

192. *Id.*

193. For a discussion, see Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1377 (2013).

bit” or “great deal” of interest group influence.¹⁹⁴ Although further empirical research is necessary, if commissions are in fact more susceptible to industry influence, that too would be another strike against their adoption as a matter of agency design.

CONCLUSION

The question of how to design a federal agency is recurring, of considerable importance, and surprisingly under-theorized. In this Essay, we have made a general case for single-director agencies over multimember commissions. Single-director agencies are more effective at accomplishing their statutory mandates and offer greater accountability. Although proponents of multimember commissions herald the benefits of deliberation and dissent, we show that these benefits may not be that significant given the baseline of administrative law, sunshine laws, and asymmetric partisan polarization. Given that multimember commissions come with significant costs in efficacy, we suggest that those proposing new or reformed agencies avoid the form as a default presumption. There may be conditions under which this presumption can be overcome—for example, political constraints or advisory boards—but if the goal is to design an effective agency, policymakers should look to the single-director agency structure.

194. Devins & Lewis, *supra* note 135.