

THE POLITICAL ORIGINS OF THE ADMINISTRATIVE PROCEDURE ACT

by McNollgast*

Arguably the most important piece of legislation governing federal regulatory agency policy making, the Administrative Procedure Act (APA) of 1946 serves as the foundation for regulatory procedure and establishes the rights of individuals in the regulatory process. Serving to codify, rationalize, unify, and extend haphazardly-applied practice to all federal agencies, the Act helped to clarify the doctrine of procedural due process. The APA has had far reaching effects on the course of economic and social regulation. First, the Act provided a reasonably complete definition of the procedural rights of individuals.¹ The key elements were weak protection through rights of participation in rule-making procedures, but substantially stronger protection in enforcement of these rules. Second, it generated a huge body of law whose political effect is to bias policy in favor of

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¹. Legal citations coming.

the status quo.² By reducing administrative discretion, formal procedures create transactions costs that increase the time and resources needed to change policy. By enhancing the power of the court to overturn agency decisions, formal procedures give organized interests that seek to preserve the status quo a second bite at the apple. Third, notwithstanding the status quo bias, formal procedures expanded the process of agency decision making in such a way that it forced agencies to take into account and respond to the policy preferences of many relevant interests, not just those favored by the president and his appointees.³

The APA has been the subject of an enormous body of legal scholarship, which focuses nearly exclusively on two types of issues: the normative underpinnings of procedural due process and the APA's effects on regulatory efficiency. Most of this literature is normative, evaluating aspects of the act in terms of the extent to which they further effective governance and protect due process rights. This debate revolves around hoary constitutional issues, such as the meaning of due process and the extent to which delegation of policy implementation to the bureaucracy constitutes an anti-democratic abdication of control over policy by Congress.⁴

². Noll (1977), Owen and Brauetigam (1978), McNollgast (1987).

³. See, e.g., Cohen (1979).

⁴ *** Cites: Gellhorn, Mashaw, etc.

Only occasionally do legal scholars analyze the political circumstances surrounding the APA's passage.⁵ According to most legal scholarship, the purpose of the APA was to codify and rationalize existing practice of procedural due process that had percolated in a haphazard manner through the courts in the 1930s. According to this view, the passage of the act was uncontroversial.⁶

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

⁵. See, e.g., the various papers in the *Virginia Law Review's* (1986) special issue celebrating the APA's 40th anniversary. See however, Shapiro's (1986a) critique in that issue and his book on administrative law published in the same year (Shapiro 1986b).

⁶. See, for example, Gellhorn (1986) and Morrison (1986).

Very little work in the positive political analysis of administrative procedure, with the notable exceptions of Shapiro (1986) and Shepherd (1996), has focused on the origins of the APA itself. Often, instead, the focus is on the enactment and implementation of policy-specific programs.⁷ However, the passage and structure of the APA presents many puzzles for PPT and the study of law more generally. For example, why did the Democrats switch their position on procedural due process and agree to pass procedural limitations on agencies in 1946. Furthermore, why did the parties in Congress form a 'grand coalition' in favor of the APA? Why did it take until 1946 to codify procedural due process? Why did Congress include some types of procedural due process and not others? The purpose of this article is to address these puzzles.

We argue that the answers to many of these puzzles are to be found in the profound partisan changes occurring in the political system at the time. We believe that two main changes were at the heart of the matter. First, the New Deal Democrats realized that their prospects for retaining the presidency were growing increasingly dim after Roosevelt's death in 1945. Thus, the New Dealers could no longer count on a benign administration,

⁷. Much of this research focuses on programs created since the passage of the APA. See, for example, ***. Others have studied programs that predate, and to some extent, gave rise to the APA. Examples of studies that apply positive political theory to the political origins and substantive importance of administrative procedures in legislation predating the APA are Fiorina (19**), Gilligan, Marshall and Weingast (1987?) on the Interstate Commerce Act of 1887, O'Halloran (1994) on the RTAA, and Shipan (1996?) on the Communications Act of 1934.

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

The importance of our finding is its demonstration that much more was at stake in the establishment of administrative procedure than fairness, equity, concern for individual liberties, and administrative efficiency. Rather, political preferences over economic outcomes, as well as political opportunism, played major roles in shaping the foundations for the present administrative state. The liberal Democrats only accepted procedural due process and judicial review when it appeared advantageous to their interests, and when combined in a logroll that consolidated the gains of the New Deal and that empowered Congress vis-à-vis the executive.

The structure of this article is as follows. In Section 1, we discuss in general terms how procedural provisions have policy effects. This leads to our discussion in Section 2 of why Democrats' preferences shifted to favor procedural constraints during the early 1940s. Section 3 details the specific provisions of the APA, and addresses how those provisions contained a compromise over policy and procedure between the three partners in the grand

coalition. That is, we discuss how the provisions of the APA served to consolidate gains of the New Deal while affording greater protection for individual rights. We perform a detailed comparison of the provisions of the APA and the (failed) major effort by the Conservative Coalition to establish procedural restraint on New Deal agencies, in the Walter-Logan Bill of 1939-40. We compare the APA against the Walter-Logan bill, in terms of the provisions of each act, the partisan conditions surrounding each act, and the fates of each act, and the coalitions favoring each act. This we undertake in Section 4, arguing that the vastly differing fates of the APA and the Walter-Logan bill—one passing by voice vote with grand coalition support and little presidential opposition, the other passing Congress on a strict Conservative Coalition vote and being vetoed by FDR—can be explained by changes in partisan conditions from 1940 to 1946. Finally, Section 5 contains a thorough analysis of the dimensions underlying the votes on the Walter-Logan bill, and Section 6 concludes.

1. The Policy Effects of Administrative Procedure

In this section, we first provide an overview of the institutions of delegation, and we discuss two dangers that Congress encounters in delegating to the bureaucracy: agency drift and political drift. Second, we provide a formalization of the legislature's choice of procedures governing the agency relationship, which we use to develop intuition about the political conditions under which Congress would be expected to establish procedural constraints on agencies. In the next section, we will apply the intuition from this theoretical model to analyzing both the timing and the form of the APA.

Delegation of policy making authority to administrative agencies is potentially attractive to elected officials. Doing so enables them to write simpler statutes, allows the

details of policy to adjust to new knowledge and changed circumstances, and creates an expert body that can provide useful information about the needs for changes in either legislation or appropriations. However, delegation creates two distinct problems for elected officials: agency drift and political drift. Agency drift refers to the circumstance when an agency adopts policies that are not consistent with the agreement among elected officials that is embodied in its statutory mandate, and corresponds to the idea that an agency is autonomously "out of control" in pursuing its agenda. Political drift arises when some future elected officials prefer different policies than the agreed policy among the coalition (including the President if enacting the statute did not require a veto override) that enacted a statute and enjoy sufficient power to force the agency to alter its policies.

With respect to agency drift, bureaucratic decision makers are advantaged if they can act in secrecy and present political officials with a policy decision as a *fait accompli*. When significant differences of opinion divide members of the House, Senate and the presidency, corrective legislation is not possible.⁸ In this circumstance, if an agency deviates from the original policy (within certain bounds), at least one of the three branches will prefer the deviation, dooming corrective legislation. Yet *ex ante* all parties may like to prevent the possibility for *ex post* deviations.

Political drift arises from a different problem. If a legislative agreement represents a compromise of significant differences, at least some parties to the compromise would prefer to alter the policy *ex post* if given the opportunity. And, even if legislation is not controversial when enacted, future elected officials may prefer a different policy, and

⁸. McNollgast (1989).

welcome an opportunity to alter the legislative agreement. If the institutional arrangements governing the delegation of authority to an agency give some subset of elected officials influence over an agency—such as a congressional committee through its oversight responsibilities or the President through appointing agency leaders and judges who review agency decisions—these officials can pull agency decisions away from the coalition's policy agreement in ways that could not be achieved by statute.⁹ Moreover, if the officials who cause political drift are veto players in the legislative process (as is the case of congressional oversight committees and the president), as with agency drift the old coalition agreement can not be restored by corrective legislation. Although political drift will benefit some elected officials, ex ante members of the enacting coalition will seek protection against it. Furthermore, as Moe (1989) persuasively argues, organized groups that support a new statute understand the problem of ex post deviation and so demand ex ante protection against it, inducing their representatives to seek means of preventing drift.

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

⁹. See McNollgast (1989).

and A, respectively, and denote the policy agreement among the elected officials who enacted the policy as R_0 and A_0 .

In practice, Congress and the President possess several tools to influence ongoing agency operations. One category consists of direct controls through the budget¹⁰ and other aspects of "fire alarm" intervention.¹¹ In addition, as emphasized in the positive theory of administrative law, members of the enacting coalition can include provisions in new legislation to create a structure and process that channels and constrain agency decisions. The point of these procedures is not to predetermine policy outcomes, but to create a decision-making environment that mirrors the political circumstances that gave rise to the establishment of the policy, thereby inclining the agency to serve the same political constituencies that were the intended beneficiaries of the original statute.¹² Finally, members can enlist the judiciary to protect against both forms of drift by enacting provisions for judicial review of agency decisions.¹³

The positive political analysis of administrative law has provided us with some ideas about the policy effects of administrative procedures. The formalization of administrative procedures performs three essential tasks. First, formalized procedures advantage organized interests; as a consequence, regulated firms may be capable of capturing regulatory

¹⁰ Kiewit and McCubbins 1991.

¹¹ McCubbins and Schwartz 1984; Lupia and McCubbins 1994; Weingast 1984.

¹² McCubbins 1985; McCubbins, Noll, and Weingast 1987; McCubbins and Page 1987; McCubbins, Noll and Weingast (1989).

¹³ McCubbins, Noll, and Weingast 1987; Shipan 1996.

agencies.¹⁴ Second, formalized procedures facilitate political control of agencies both by enabling effective oversight and by stacking the deck in agency proceedings in favor of the interests that were paramount in the passage of the agency's enabling statute.¹⁵ Third, formalized procedures increase the influence of the legislative and judicial branches at the expense of the executive.¹⁶

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

First, assume that agency decision makers have preferences over the policy outcomes, R and A , and face costs of making decisions that depend on the structure and process of the agency. Formally, let $U_a(A)$ and $V_a(R)$ represent the value an agency places on A and R , respectively. Assume that U and V take maximum values at A^* and R^* , and for convenience that the second derivatives of these functions are negative. The origins of agency preferences can take one of two forms. Perhaps they reflect the particular and unique preferences of agency officials, in which case the quest to implement A^* and R^*

¹⁴ Noll, Spiller, Owen and Braeutigam

¹⁵ Bawn (1993), Cohen (1979); Kiewiet and McCubbins (1991), McCubbins (1985), McCubbins and Schwartz (1984), McCubbins, Noll and Weingast (1987, 1989), Olson (19**), and Weingast (1984).

¹⁶ Kiewiet and McCubbins (1991), McCubbins, Noll and Weingast (1987), Weingast (1984).

represents agency drift. Or, perhaps these preferences are those of an elected official (the President who appointed agency officials or the chair of the congressional committee that engages in oversight of the agency), in which case the problem is political drift.¹⁷

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

$$C(A) = K_a(P_a) + f_a(|A-A_0|, P_a) \text{ and}$$

$$C(R) = K_r(P_r) + f_r(|R-R_0|, P_r),$$

where K_i , $i = \{A, R\}$, is a component of the cost of a decision that depends only on the complexity of the procedural requirements, P_i , imposed on the agency, and f_i is the other component of decision costs that depends on both the procedural requirements and the magnitude of the deviation of the agency's decision from the coalition's agreement.¹⁸

Assuming both K_i and f_i increase at constant or increasing rates in P_i , and f_i also increases at a constant or increasing rate in the magnitude of the departure of its decision from the agreement of the enacting coalition.¹⁹ The idea behind separating costs this way is that

¹⁷ See Calvert, Moran, and Weingast (1987); Olson (19**); Shipan (1996); Weingast and Moran (1983).

¹⁸. The notion that procedures rule out some decisions can be incorporated in this framework by letting the decisions costs be so great (e.g., infinite) and outside the feasible limits of policy choice. Assume that an agency would never make infeasible decisions.

¹⁹ These conditions require that marginal costs be non-decreasing in procedural complexity and the distance of the policy from the coalition's agreement. These conditions assure an internal solution to the agency's maximization problem.

procedures create an incentive to bring decisions more in compliance with the wishes of elected officials, but also raise the costs of all decisions, whether complying or not.

The agency can be modeled as picking the most valuable decisions that are feasible, given its budget constraint. The agency problem is then as follows:

$$\begin{aligned} & \text{Max } U_a(A) + V_a(R) - C(A) - C(B). \\ & A, R \end{aligned}$$

If decision costs are zero, the agency will pick its most preferred outcomes, A^* and R^* . As noncomplying decisions become more costly to the agency, the agency's decisions will move away from A^* and R^* and towards A_0 and R_0 .²⁰

In picking procedural requirements for the agency, elected officials anticipate the relationship between procedures and the agency's degree of compliance with their policy agreement. These officials can be modeled as maximizing the value of agency decisions, net of the costs of procedural requirements to elected officials.²¹ Using the same notation, the elected official's problem is as follows:

$$\begin{aligned} & \text{Max } U_e(A) + V_e(R) - C_e(A) - C_e(R) \\ & P_a, P_r \end{aligned}$$

²⁰. These conclusions summarize the first order conditions and comparative statics analysis of the agency's maximization problem.

²¹. One natural interpretation of the procedural costs experienced by elected officials is in terms of their loss of support among constituents who also face costs from procedural complexity. Another natural interpretation is the cost to elected officials of responding to fire alarms. Still another is the budgetary cost of operating procedurally complex agencies.

subject to the constraint that the agency will pick A and R to maximize its welfare. If elected officials impose no procedural requirements, of course, the agency will pick A* and R*. Hence, elected officials will make no use of procedures to prevent policy drift *only if* the agency's ideal policies are at or near the preferred policies of all members of the coalition that enacted the agency's governing statute. Thus, we have the following hypothesis:

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

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

Corollary: As the preferences of the members of the enacting coalition diverge (from unified purpose), members of the enacting coalition will increasingly favor procedural restrictions on administrative agencies.

We argue that this is essentially what happened just after the conclusion of the Second World War. The New Dealers could look down the road and see the potential for a Republican president being elected in the near future, and so they could anticipate that the presidency's ideal point would diverge from their own. In the next section, we provide an historical overview of the period, and show how the worsening of New Dealers' prospects led them to favor increased procedural restraint.

2. The Story of the Democrats' Switch of 1946

By 1946, with the weakening of the New Deal coalition, the rise of the Conservative Coalition, and the reinvigoration of the Republican party, the New Dealers could no longer be assured of possessing a veto over agency or political drift by either Congress or the

executive. When the New Dealers had controlled majorities in both chambers of Congress, and were matched with a sympathetic administration, they had passed enabling statutes that created agencies with few procedural requirements or restrictions, which is consistent with our hypothesis just derived. Furthermore, these statutes often severely restricted the scope of judicial review, so the executive was relatively unhindered in implementing the New Deal program.²² Even after the New Deal coalition in Congress deteriorated at the end of the 1930s, President Roosevelt's veto remained a sufficiently effective tool to reject legislation that sought to establish procedural restraints on administrative agencies.

Republicans, frustrated in their attempts to defeat new regulatory measures or repeal old ones, sought to hamstring regulatory agency policy making by imposing a series of strong procedural and judicial constraints on agency action. Naturally, New Dealers opposed attempts to restrict their programs. Nearly every year from 1938 to 1946, Republicans and southern Democrats introduced legislation on administrative procedure that was designed to limit agency policy discretion.²³ None, however, were enacted into law, as New Dealers were always able to defeat measures that threatened to restrain agencies, for they favored keeping "administrative procedure firmly in the hands of the executive branch itself, and imposing only the thinnest restraints on agency action."²⁴ When the New Deal Democrats enjoyed commanding majorities in congressional and presidential

²² See Milkis (1990?) for an extended version of this thesis.

²³. For details, see Shepherd's (1996) excellent history of the APA. Briefly, the bills that were introduced include [list attempts.]

²⁴. Shapiro (1986), p. 452.

elections, Democratic party leaders in the legislative branch had no reason to burden agency decisions with cumbersome procedure. Not only did Democratic legislators share the president's policy objectives and enjoyed popular political support because of the strength of the President in the electorate, the courts remained as the only significant bastion of Republican support. Substantially increasing procedural rights in administrative procedure would only empower the Republican court to do still more damage to the New Deal.

By 1946, however, the political situation had changed substantially. First, the Democrats had lost their commanding majorities in the House and Senate, and Roosevelt had died and was replaced by a nationally-unknown congressman from Missouri, Harry Truman. After witnessing the defeat of Churchill just two years earlier, and observing the weakness of their own president's leadership in the White House, the future looked rocky to the New Dealers.²⁵ The Democrats faced the very real possibility that they would lose control of Congress in the 1946 election (which they did) and that the Republicans would capture the White House in the election of 1948. They perceived that such a chain of events would most likely lead to the reversal of numerous New Deal programs.²⁶ Furthermore, having split over the issue of civil rights in 1937, the Democrats no longer governed as a majority party. Rather, from 1937 to the mid-1970s, they governed as a procedural coalition, where the leadership of the party and the top committee posts in the House and Senate were split between the southern and northern factions. The substantive policy

²⁵ Cites on Truman, Dewey, etc?

²⁶ Kiewiet and McCubbins (1991) show that the Republicans, when in control of the House and Senate, did indeed cut New Deal programs for FY 1948-49 and FY 1954-55.

agenda advanced by the Democratic party during this period was much smaller than the Democratic agenda before or since.²⁷

New Dealers in Congress could no longer be assured of the permanence of a benign administration. Consequently, it was often less costly for the Democrats to forge bipartisan coalitions in Congress than it was to forge a coalition with the president (Sala 1994). During this time, many of the most important bills to become law, such as Social Security and income tax reforms, were passed by bipartisan coalitions in the House and Senate over the objections of the president.²⁸ This is especially true for the southern Democrats when facing a New Deal Democratic president, and gave rise to the so called Conservative Coalition.

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

²⁷ See Cox and McCubbins (1993).

²⁸ Also, history of Conservative Coalition action... some vetoes.

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

What explains the willingness of the New Dealers to delegate to the judiciary in 1946, in sharp contrast to the divisive conflict with the Court a mere decade earlier? By 1946, the Democrats had been able both to expand the federal judiciary, and to stack the judiciary with Roosevelt's appointees, such that the partisan composition of the federal courts had shifted dramatically in favor of the Democrats. Thus, a sweeping reform like the APA would overrule earlier statutes, such as those creating the Securities and Exchange Commission, among others, that had severely limited powers of judicial review over agency decisions. In other words, just as the initial restrictions on judicial review had come about due to conflict of interests between Congress and the courts, the lifting of those restrictions in the APA was due to a liberalization of the judiciary.

Thus the Democrats came to favor procedural restraints on agency action for two reasons. First, the prospect that the Republicans would gain control of the presidency in the election of 1948 caused a change in the concerns of New Deal Democrats. The new concerns echoed the concerns of the conservative coalition, that an absence of procedural due process in agency decision making gave the executive branch too much policy discretion. The danger was that a Republican president could use this broad discretion to undo much of New Deal regulatory policy simply by appointing anti-New Dealers to head these agencies. Since procedural restraints make it costly and politically difficult for agencies to change existing policy (McNollgast 1987, 1989), the establishment of procedural due process would blunt any Republican president's ability to dismantle or shift the regulatory politics of the New Deal. Indeed, with the procedural restraints in place, the Republicans could only repeal New Deal regulatory policies if they gained control of both houses of Congress and the presidency.

Likewise, with a New Deal judiciary firmly entrenched, due process guarantees and would provide New Deal Democrats with a measure of protection from Republican appointees who might pursue administrative repeal of the New Deal. Indeed, 35 years later, when Reagan appointees attempted roll-backs of regulations, the courts played precisely this role. The enhanced role of the courts under more formalized procedures was appealing to Democrats for the same reason that it had been appealing (but unachievable) to Republicans during the 1930s. A Republican-dominated federal judiciary would harness the New Deal; a Democrat-dominated one would be expected to favor the New Deal. Over the course of Roosevelt's presidency, ideological conflict between New Dealers and the courts diminished from the levels observed between 1932 and 1937. By 1946, Roosevelt had

appointed eight of the nine Supreme Court justices and ~~xx~~ of the appeals and federal district court jurists.²⁹ The newly constituted Supreme Court had a clear majority in favor of the New Deal.^{30, 31}

It is clear that the overwhelming Democratic majorities in the House and Senate between 1932 and 1938 created the necessary conditions for the optimal decision of the

²⁹ As is typical after a change in partisan control, early in the New Deal, congressional Democrats vastly expanded the federal judiciary, shifting the balance of appointees from Republicans whose sympathies lay with *Lochner* to Democrats who shared the New Deal ideology. On the Supreme Court, due to the constitutional threat inhering in the large New Deal majorities after 1936, the problem of enforcing the *Lochner* philosophy on increasingly unsympathetic lower courts, and the vacancies created by the departure of Republican-appointed justices, allowed Roosevelt to shift the Court in his favor. See McNollgast (1996) and DeFigueireido and Tiller (1996).

³⁰. This argument is a common conclusion of the spatial theory of voting. Kiewiet and McCubbins (1988), for example, use this logic to show why the president's veto threat is asymmetric. When the president prefers more than the median voter in Congress, a veto would make the president worse off and so is not credible.

³¹. Shepherd (1996) shows that, "although conservatives indicated their grudging support for the bill, they ... would have preferred stricter controls on agencies" (p. 1671).

"Republicans refrained from offering amendments because they feared upsetting the fragile compromise that the parties had reached" (p. 1672).

enacting coalition to adopt minimal administrative controls for most New Deal agencies.³² While Republicans and some southern Democrats may have preferred more procedural control, their support was unnecessary for passage of the New Deal agenda, so their concerns could be ignored. After 1938, the median preferences in the House and Senate move away from New Deal ideology, but not the preferences of the President. Hence, even when the conservative coalition managed to form a congressional majority to adopt procedures that would have the effect of pulling agency decisions away from the outcomes desired by the New Dealers, the President could veto the legislation. By 1946, however, the policy preference of the President was becoming a lottery over a liberal Democrat (perhaps Truman, perhaps a substitute if Truman could be dumped in 1948) and a Republican (Dewey or Taft) who would be antagonistic to the New Deal. At this point political drift for the first time became a concern for New Deal Democrats.

We recognize that we have not included any role for the courts in our model thus far. We can incorporate courts into the theory through specifying the mechanism for reviewing agency decisions for compliance with statutory requirements regarding both substance and administrative procedures. Elected officials can decide who will review these decisions. In addition to judicial review, the enacting coalition may delegate the authority to review to the President or Congress. Selecting the judiciary to review these decisions

³² An interesting exception is the broadcasting component of the Federal Communications Commission, which was transferred into the new FCC in 1934 from the old Federal Radio Commission, a creation of the Republicans in 1927. Hence, the broadcasting sections of the Communications Act of 1934 are replete with procedural detail (Shipan 1996), a result that suggests concern about agency drift on behalf of New Dealers.

has two main advantages. First, elected officials can avoid the costs of reviewing these decisions themselves. Second, each member of the enacting coalition can avoid opportunistic, non-complying decisions by the other that would be feasible if any one of them were to have an ex post veto over agency decisions. Of course, the disadvantage of selecting the judiciary is that the courts may not share the policy objectives of the enacting coalition, and so may overturn agency decisions that comply with the agreement of the enacting coalition.

In terms of our story about the APA, in the early New Deal, when the preferences of majorities in the House and Senate plus the President were aligned, the judiciary was hostile to the New Deal, so the enacting coalition should seek to minimize the role of judicial review. By 1946, the judiciary was controlled by Roosevelt appointees and was no longer hostile to the New Deal. Indeed, New Deal legislators faced the prospect that after the election of 1948, either Congress or the President might be more hostile to the New Deal than the judiciary if Republicans took control of either branch. Hence, by 1946, more extensive judicial review seemed more attractive to New Deal Democrats.

3. From Walter-Logan to APA: The New Dealers' Switch of 1946

Almost immediately after the first 100 days of the Roosevelt administration, opponents of the New Deal had begun to pursue procedural and substantive means of undermining agency policy making. In 1933, the American Bar Association (ABA) created the Special Committee on Administrative Law, which presented its first formal report and criticism of New Deal procedures and policy-making the following year. By the late 1930s, the Special Committee, then led by an articulate New Deal opponent, Roscoe Pound, began making detailed procedural recommendations. These provisions were embodied in "An Act

to Provide for a More Expeditious Settlement of Disputes with the United States," later known as the Walter-Logan Bill. The 1938 ABA report sought creation of a new United States Court of Appeals for Administration "to receive, decide, and expedite appeals from federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest, and for other purposes."³³ The idea was to give the new court authority to evaluate agency rulings, including the power to issue declaratory determinations. A means of preventative justice, these determinations would expedite concerns before agencies by granting relief for individuals and firms affected by agency decisions.

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

³³. ABA (1938). [page #]

New Deal critics sought remedies in the form of procedures that would grant individuals and firms greater rights within the regulatory process, greater access to the courts for judicial review, and stronger tools for the judiciary to review and intervene in agency procedures. They also sought to standardize procedures for agencies — at least, for those created after 1933.

The provisions of the Walter-Logan Act were as follows. By far the dominant purpose of the Act was to strengthen individual rights and judicial review. Indeed, the bulk of the act, including the three largest sections (3-5) focused on judicial review. Section 2 sought to repeal recent agency rulings. "Rules now in existence (other than those in effect over 3 years) must, under the bill, be reconsidered after a public hearing if, within a year after the bill becomes a law, any person substantially interested in the effects of the rule so requests." Section 3 provided for a new sweeping grant of jurisdiction to the United States Court of Appeals for the District of Columbia to review agency rules. The bill also imposed an evidentiary standard of substantial evidence, attempting to limit an agency's ability to act on its whims and without sufficient record. Also of importance is the bills list of exemptions in section 7, which included nearly all agencies created before 1933 under Republican administrations and thus more likely to be serving interests favored by Republicans.³⁴

New Deal proponents did not ignore the issue of procedure, though they sought to delay dealing with them. In 1939, as the Walter-Logan bill moved through Congress toward passage, President Roosevelt set up his own committee to study the problem. He asked Attorney General Murphy to appointment a committee to undertake a particularized

³⁴. List excluded agencies.

examination of administrative function and to investigate the need for procedural reform. One legal scholar who was present during those debates later characterized this committee as the first intensive and extensive inquiry into the methods of federal agencies, thereby implicitly criticizing the ABA's investigation and report.³⁵

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

The Walter-Logan bill moved through Congress in 1940, passing the House on April 18 and the Senate on November 26. The House concurred with the Senate amendments on December 2, sending the legislation to Roosevelt. The President vetoed the bill on December 17, citing among other reasons that the bill was designed largely to benefit lawyers, that Congress had acted before the Attorney General's report was completed, and that the bill gave insufficient exemption to defense agencies.³⁶ No legislation was introduced during 1942 or 1943, but Congress again considered administrative reform when legislation was introduced in 1944 and 1945.

³⁵. Gellhorn (1986).

³⁶. With respect to lawyers, Roosevelt said in his veto message, "The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation." (Roosevelt 1940, 3).

Congress passed the APA in early 1946 (with the Senate approving in February, and the House in May) and President Truman signed the legislation in June. The act provided for the following. (1) It required agencies to publish in the Federal Register a description of their organization and rule-making procedures and to hold hearings or provide means of public comment on proposed rules. (2) It prescribed standards and procedures for agency adjudication, including licensing and injunctive orders. Among the requirements were adequate notice to parties concerned, separation of prosecution and decision functions by prohibiting investigatory or prosecuting officials from deciding cases, and granting some discretionary authority for agencies to issue declaratory rulings. (3) It spelled out hearing procedures, including requirement that proponents of rules should have burden of proof and that no decision could be made except as supported by "relevant, reliable and probative evidence." (4) It provided that any person suffering legal wrong because of any agency action be entitled to judicial review except where statutes precluded review or where agency action was by law committed to agency discretion, but required the aggrieved party to exhaust administrative remedies first. (5) It directed each agency to appoint competent examiners to act as hearing officers and to make or recommend decisions.

Shapiro (1986) provides the following overview of the political struggle underlying the APA. According to Shapiro, the APA as originally enacted divided administrative law into three parts. These correspond not only to different types of procedures, but types of processes desired by different of politicians.

First, "for matters requiring adjudication, in which government action was directly detrimental to the specific legal interests of particular parties, the compromise was heavily weighted in favor of the conservatives. The demand for totally separate tribunals was

ignored...but the agencies' processes were to be considered quasi-adjudication and were to be governed by adjudicative-style procedures, presided over by relatively strict judicial review."³⁷ Second, rule-making constituted an almost total victory for the liberal New Deal forces. No adjudicatory-style hearings were required; no records on rule-making would have to be generated for possible review; and the standard of review made an agency's decisions irreversible unless it had acted arbitrarily or irrationally. Third, for everything the government did that was neither adjudication nor rule-making, no procedures were prescribed.

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

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

³⁷. Shapiro (1986), p. 453.

Congress off-load this task onto their constituents who have sufficient incentive to follow agency proceedings in detail. When something goes awry, constituents pull the fire alarm, bringing the attention of political officials down on agency proceedings. To the extent that sustained congressional attention is costly to an agency, it will seek to avoid congressional attention by serving congressional constituents so that alarms do not get pulled.

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

The APA greatly enhances the efficacy of congressional sanctions. The fire alarm mechanism requires that constituents know what the agency is planning to do. Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituents groups and an agency. To undertake this function, elected officials must have ready access to relevant information: what are the issues actually at stake in the decision; who are the aggrieved parties; and what are the likely

consequences of pending policy decisions. The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.

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

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

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

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

With respect to the list in the long second to last sentence, the act grants the courts the power to define arbitrary decisions and an abuse of power, including acting without notice, without adequate participation, without adequate evidence, and so on. Then, courts, not agencies, are the locus of both constitutional and statutory interpretation, implying that new agency officials cannot set aside judgements about statutory intent governing existing decisions. Moreover, courts, not agencies, determine whether agency actions violate other legislation or citizen rights. Finally, courts determine whether agency decisions are unwarranted by the facts.

As legal scholars observe, these provisions all have natural interpretations in the moral theory underpinning due process and the rule of law, which probably was part of the

motivation for these provisions, particularly the perception that many agency decisions were arbitrary.³⁸ But a view that ignores the politics underlying the enactment of the APA leaves two puzzles: why did it take so long to enact these noble provisions, and why did the legislation implement these philosophical principles in the APA form, rather than the form proposed by the ABA, the Walter-Logan bill, or the Attorney General's report? Our theory provides a framework for answering these questions. The form taken by administrative procedures has important political effects for the immediate post-War environment and the Democrat's dilemma of 1946. First, these procedures limit some of the most egregious abuses of discretion under the New Deal, thus granting something to southern Democrats. Second, they helped limit the ability of new Republican regulatory officials from perverting New Deal legislation should the Republicans capture the presidency. Short of united Republican control, which would allow Republicans to repeal the New Deal by legislation, the Democrats could forestall immediate demise of the New Deal.

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

³⁸ cites

controlled legislative branch to take sanctioning actions (such as refusing to appropriate funds) before the deed was done.

A Spatial Model of the Democrats' Switch of 1946

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

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

[Figure 1 about here.]

We locate the ideal policy of the median Northern Democrats in the lower left, corresponding to a preference favoring federal economic intervention and a high degree of protection for political and civil rights. The median of the Southern Democrats (SD) is located in the upper left, a bit to the right from the Northern partisans on the economic dimension, preferring nearly as large a federal presence in the economy, but with a

considerably lower preference for political and civil rights. The median Republicans (R) is located on the lower right, preferring far lower levels of federal economic intervention but a relatively high level of protection of political and civil rights as Northern Democrats.

In Figure 1, we also plot the Pareto set, the set of policy alternatives for which one group can be made better off only by making one or both of the others worse off. The Pareto set corresponds to the triangle connecting the ideal points of the three groups. We represent President Roosevelt's ideal policy as P_D . The status quo policy, Q, during the late New Deal represents the policies enacted by the New Deal Democrats over the first two Roosevelt administrations. For simplicity, we set $ND = P_D = Q$.³⁹

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

[Figure 2 about here.]

As long as the New Dealers retained united political control of the president and Congress, they preferred a high degree of agency discretion. United political control

³⁹These policies could all be located at different policy alternatives in the neighborhood of ND without changing any of the results that follow.

allowed them the tool to influence agency administrators and agency decisions. Significant agency discretion thus allowed New Dealers the flexibility to impose new policies at a relatively low cost. Consistent with this, throughout the 1930s and the war years, New Dealers opposed all attempts at administrative procedure reform.

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

In the context of electoral uncertainty, New Deal Democrats valued the APA's reduction in the degree of agency discretion. We show the impact of these procedures in figure 3, which represents the degree of agency discretion under the APA as a smaller circle around the status quo. In the case of a Republican president facing a Democratic Congress, the new president could unilaterally move policy to A_{APA} . The policy change under the APA

(from Q to A_{APA}) is smaller than that without the (from Q to A_R).

[Figure 3 about here.]

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

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

We represent the WL alternative as the alternative WL in figure 4. We locate W on the line segment connecting S and R because this represents the maximal change from Q that makes both coalition partners better off. Any point off the line toward Q would leave policy benefits untapped; any further away from Q would make both SD and R worse off.

[Figure 4 about here.]

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

the line vote in favor of WL; all below and to the left of the line vote in favor Q. We test this prediction in the next section using logit analysis of the vote on the WL bill.

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

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

A final implication of the model concerns voting on the APA. Standard wisdom about the APA holds that the unanimous support and lack of alternative proposals reflect a consensus over administrative procedure and, further, that this act was therefore above politics. We have argued that the Northern Democrats were the principal opponents of

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

A grand coalition emerged in support of the APA, but not because everyone agreed that these were the best form of procedures. The supporters of WL wanted a much larger move than that represented by the APA. According to Shepherd (1996, 1670-71):

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

But a coalition formed in support of the APA because that bill altered the status quo in the

direction preferred by everyone, even members of the conservative coalition.

V. Empirical Results

Our empirical investigations provide evidence supporting our approach. Figure 5 represents the members of the House by their Poole-Rosenthal (PR) scores. These scores characterize each member of Congress along two dimensions, corresponding to economic ideology (left favoring government intervention, right opposing) and the second, a political and civil rights dimension. Each symbol in the figure represents a member of Congress. The Republicans are clustered on the right, in the "cloud" of points that moves upward and to the right. The other two clusters are the Democrats, with Southern members being highlighted by "+" symbols.

[Figure 5 about here.]

As can be seen from the figure, Northern Democrats are, on average, furthest to the left on the economic dimension, Southern Democrats are somewhat to the right of their Northern partisans, and Republicans are, on average, furthest to the right. Poole and Rosenthal's estimates on average separate members of the different groups into different regions. This indicates that, on average, members of each group voted more like one another than like members of the other groups. Although there is some overlap between Northern Democrats and Southern Democrats, on average, these members have different scores.

Table 2 breaks down members by party and region.⁴⁰ The table reveals that the three groups were roughly similar in size in the following sense: any two form a majority, as figures 1-4 suggest. Moreover, the average PR scores differ in precisely the way we

⁴⁰The figures do not add up to 435 because the tables do not include members with other party affiliations.

assumed in the theory: Northern and Southern Democrats are reasonably alike on the ECON dimension and both very different from the Republicans. On the RIGHTS dimension, Northern Democrats differ considerably from Southern Democrats, while the Republicans are much closer to Northern Democrats than to Southern Democrats. This analysis supports the assumptions underlying our model of the political situation from the late 1930s to the late 1940s as one of three blocks of relatively coherent voters.

Analysis of the vote on the Walter Logan bill

Because the APA passed by a voice vote in 1946, we have no record of who supported it — or whether it was in fact unanimous, as many accounts suggest. We therefore analyze the vote on the 1940 Walter Logan bill using logit analysis.

The dependent variable, VOTE, represents each House member's vote to recommit the WL bill, which would have killed the measure. The motion failed on a vote of 114 to 279. Our analysis uses three sets of independent variables. First, we use a set of dummy variables characterizing a member's region: NE for the New England and Mid-Atlantic states; SOUTH for the eleven states of the confederacy; and WEST for the rocky mountain and pacific states. Second, we use a dummy variable for each member's party (DEM = 1 if a Democrat, 0 otherwise). Finally, we also use each members PR scores, ECON and RIGHTS, corresponding to the two dimensions discussed above.

Table 2 displays the results for two specifications. Consider first specification (1), which includes all the independent variables. First, the estimated coefficients of the two PR scores are as our model predicts: ECON is large and statistically significant. RIGHTS is also statistically significant, although its coefficient is considerably smaller. In combination, these two coefficients show that the cutting line is downward sloping to the right. Because

the coefficient on ECON is several times larger than that on RIGHTS, the cutting line is more vertical than horizontal, as we predicted. This supports the discussion in section IV, which suggests that the vote over administrative procedures was only in part over rights, with preferences over the role of the federal government in the economy being a major, perhaps primary factor.

None of the regional variables are statistically significant in the presence of the other variables. This does not imply that region is irrelevant, just that the additional effect of region in the presence of the PR scores and party is insignificant. Put another way, it suggests that the PR scores and party are sufficient to capture the large regional differences in behavior. This interpretation is supported by the results in specification (2), which omits the PR scores from the analysis. In this specifically, the regional dummies are statistically significant and of the intuitive sign. The party variable, DEM, is also statistically significant, though oddly in specification (1) its sign is of the opposite one would expect, given average differences between Democrats and Republicans.

Figure 6 plots how each member voted on the motion to recommit, by PR score. The “+” symbols here indicate a vote in favor of recommitting the bill. The figure also shows the cutting line dividing those who voted for recommitting from those who voted against. As our model predicts, the cutting line slopes downward to the right.

In sum, these results support for our theoretical perspective. Voting on the WL bill pitted New Dealers against the conservative coalition. The latter sought to impose strict administrative procedures, granting courts significant powers to protect economic rights, as a way of fighting the New Deal. Although Roosevelt’s veto killed this measure, congressional passage nonetheless underscores the importance of policy in the formulation

of administrative procedures. As our results suggest, administrative procedure was intimately involved with policy, not merely normative issues of due process.

[Figure 6 about here.]