

The administrative state's legitimacy crisis

By Philip Wallach

INTRODUCTION



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Why do we put up with our government? Maybe just for the same reason we put up with getting old: it beats the alternative. But that reflexive Hobbesian answer is a feeble basis for government legitimacy; even authoritarian states give their subjects more appealing justifications for their power, and open democratic societies must do much better. We may put up with our democratic government because its performance meets our expectations; because we genuinely feel it to be *ours*; or, failing those, perhaps simply from a Churchillian confidence that what we have beats the alternatives.

At present, none of these justifications seems to be convincing the mass of citizens across western democracies. Their expectations meet bitter disappointment; their governments seem to serve elites with political priorities divergent from their own; and there is a growing sense, evident even among insiders, that our institutions specialize in producing dysfunction and might well be replaced by something better.

People begin to doubt not only the recent performance of their governments, but their basic legitimacy: their claim to be uniquely representative institutions working on the public's behalf.

A wide variety of factors have contributed to these feelings of disillusionment: a generation of underwhelming economic growth, a lingering hangover from a global economic crisis attributable to elite hubris, an unsettling of the post-Cold War concert by rising dragons and ornery bears, and a partial erosion of lines of social authority that had long seemed immovable. People begin to doubt not only the recent performance of their governments, but their basic legitimacy: their claim to be uniquely representative institutions working on the public's behalf. Some observers acknowledge our legitimacy problems but are confident that they will disappear if only these underlying problems are somehow adroitly managed. If only our governors ensure that our government's performance clearly outperforms the alternatives, they will win the consent or at least acquiescence of the governed.

But the nature of these problems makes it hard to believe they can be solved, especially on a timescale comprehensible to normal political life. And a deeper cause of the lost confidence in our governing institutions cannot be addressed by technocratic policy solutions. Namely, the ideal of self-government is threatened by government illegibility and incoherence. Only specialist elites seem to possess any ability to guide policy development, and trust in them has been diminished both by their increasing segregation and their evident failures. Moreover, trust in our governing institutions has been on a steady downward trend for decades now, with our latest troubles only sharpening the problem so that it attracts more notice.

Many who reject the adequacy of technocratic solutions to our legitimacy problems reach for radical measures: a Jeffersonian cleansing of our institutional stables meant to repudiate elite corruption, return America to its republican roots, and install citizen statesmen who will better serve the people through obedience to common sense and old-fashioned American morals. This is a seductive fantasy. But the idealism at its center breeds cynicism rather than inoculating against it. By promising a revolution that citizens lack the energy, motivation, or wherewithal to see through, it ensures further disappointments and disillusionment.

This paper seeks to illuminate the shortcomings of both the technocratic and Jeffersonian responses to our legitimacy problem and sketch a realistic, workable middle way, in which statesmen lead with the guidance of experts and are made accountable to those parts of the public capable of meaningfully judging their results. I seek to offer a vision of republicanism consistent with the actual capabilities and engagement of our citizens, rather than one that depends on idealized notions of citizenship unlikely to be realized in contemporary America (and probably in any modern society in a globalized world).

To fully flesh this vision out and properly situate it against intellectual and institutional developments in American history would require, at the very least, a rather substantial book. Here I attempt to very briefly articulate the nature of our current legitimacy problem before offering a fly-by history of postwar America's federal administrative state and its intellectual underpinnings. An alternating embrace and rejection of technocracy have shaped the ongoing struggle between Congress and the President to control the now-vast expanse of America's permanent federal government.

Technocracy, however, has over the long term been ascendant. I examine the arguments of its most capable defenders, who tend to regard the administrative agencies that make up America's "fourth branch" as the best functioning part of our government, and dismiss those who question their worthiness. I criticize technocrats' refusal to take government's legitimacy problems seriously as well as their willingness to insulate favored experts from outside criticisms—problems which are mutually reinforcing. I also criticize the anemic role they envision for Congress and their distaste for politics.

From there, I turn to the reactions that technocracy inspires on both the left and right, almost all of which imagine the administrative state can simply be done away with if only the right president or constitutional understanding comes along. I explain why each of these critiques is unrealistic and distracting from our actual institutional problems. I take stock of a recent clash between technocracy and one of its most thoughtful critics, explaining why the two sides talk past each other without either doing much to address our legitimacy crisis. I also explore angrier populist rejections of technocracy, which tend to condemn all intermediating institutions as corrupting. Populists thus imagine that they can have government "by the people" in some immediate sense, but their rejection of meaningful intermediation actually makes constructive politics impossible.

I go on to sketch out the rudiments of a middle way that avoids the vices of both technocracy and populism by accepting the need for an expert-centered administrative state without accepting its pretensions to be somehow outside of politics or above the need to justify itself. In this vision, government seeks not correct answers but competent responses to collective problems. To know what those problems are and how they should be handled, government needs vital processes of intermediation, probably through a well-functioning legislature. This way of thinking about self-government in the modern world implies several directions for institutional reform: localism when possible, a need for the administrative state to take seriously the task of justifying its work to outsider experts and lay citizens, exposing agencies to better and more reliable scrutiny, and building Congress's capacity to act as a useful interlocutor.

I conclude by considering the context provided by the 2016 presidential election, in which a number of leading candidates reject the current version of the administrative state and reach for Jeffersonian responses. Our current political environment gives us plenty of reasons to be pessimistic about the chances of incremental reforms, but it should also make us realize why they are indispensable.

THE NATURE OF THE CURRENT LEGITIMACY PROBLEM

Americans' faith in their government institutions is near an all-time low. Once upon a time, back in 1958 when their commander-in-chief had victorious Supreme Allied Commander on his résumé, 73 percent of Americans said they trusted government to do what was right "just about always" or "most of the time." Late in 2011, on average just 17 percent gave either of those answers, only very slightly improved to 19 percent by the end of 2015.¹ In 2015, Gallup registered a remarkably low eight percent saying they trust Congress "a great deal" or "quite a lot"—scarcely more than the five percent who volunteered the answer "none."² Nor can this loss of faith be written off as specific to our particular office-holders. Surprisingly large portions of Americans, especially younger ones, see living in a democracy as less than essential, and a growing minority judges democracy "a bad way to run America."³

Americans' loss of confidence in our government has been especially hard to ignore since the financial crisis in 2008, but trust in politicians and government has been trending steadily downward for two generations across almost all western developed countries. Notably, this overall decline is driven mostly by a loss of confidence among the educated and high-status; whereas these groups were considerably more supportive of public institutions at mid-century, by the turning of the millennium they had nearly converged with the lower level of the rest of the public. Across nations, baby boomers and later generations were less trusting than their predecessors.⁴

Surprisingly large portions of Americans, especially younger ones, see living in a democracy as less than essential.

1 Pew Research Center, "Public Trust in Government: 1958-2015" (November 23, 2015) (<http://www.people-press.org/2015/11/23/public-trust-in-government-1958-2015/>). This wasn't a uniformly steady decline: a nadir in 1979 (27 percent) was followed by a recovery in the 1980s, only to see a new low in 1994 (19 percent) followed by a recovery during the halcyon Clinton-Gingrich days to 44 percent at the beginning of George W. Bush's term. After a brief post-9/11 spike, trust has fallen fairly steadily over the last 15 years, though perhaps that decline has little room to progress further.

2 Gallup, "Confidence in Institutions" (<http://www.gallup.com/poll/1597/confidence-institutions.aspx>). In 2014, the two amounts were actually equal, at 7 percent.

3 Robert Foa and Yashca Mounk, "Are Americans losing faith in democracy?," *Polyarchy* blog on Vox (December 18, 2015) (<http://www.vox.com/polyarchy/2015/12/18/9360663/is-democracy-in-trouble>).

4 Russell J. Dalton, "The Social Transformation of Trust in Government," *International Review of Sociology* 15 (2005): 133-154.

Such a widespread and sweeping change in attitudes demands explanations at a fairly deep level. A turn against all social institutions seen as wielding arbitrary authority, often referenced as “the Sixties,” is surely one good place to start. But some observers go so far as to insist that any explanation that focuses on institutions must misdiagnose the causes, given the huge variety of institutional arrangements across western countries which have all suffered similar disenchantments.⁵ That logic is sound only if there is no common stressor on any shared feature of western nations’ institutional configurations—but there is one, which is well known and much fretted over. It is the decline of legislatures and, with them, the sense that governments truly belong to their citizens. This phenomenon has been pondered longest and most deeply in the context of Europe’s transnational institutions, in which citizens’ alienation goes by the name of the “democratic deficit.” But as the problem has become more apparent within nations as well as across them, scholars have begun to note the democratic deficit present in nearly every developed country, including the United States.⁶

Democratic deficits, appropriately visualized as chasms between regular citizens and policymakers, have yawned wider for a number of reasons. A major one is that citizen demands have totalized; nearly every human problem is now seen as a potential target for policy, and increasingly these demands have generated at least some kind of response. Citizens understandably, if unwisely, come to believe that government “solutions” touted as capable of resolving problems actually are, and they are confused and disappointed when underlying social maladies that have been the target of many rounds of bustling government involvement linger on.

Just as important, successive cycles of “new” policy initiatives have left behind an institutional residue that is now layered so thick as to be opaque to ordinary citizens’ powers of inspection. Government is a sprawling, impenetrable edifice that is encountered with frustration, rather than being perceived as an understandable emanation of current public will. There is a justifiable suspicion that the government’s complexity serves entrenched interests most of all. Legislators may channel public outrage into opportunistic potshots well enough, but there is little faith that the bulk of their work is actually serving the public—let alone bridging the chasm through edifying deliberations. Heads of government (whether Prime Ministers or Presidents) become the great hope of public-oriented reform, but they, too, inevitably disappoint, turning out to be incapable of reconciling irreconcilable rhetorical commitments and frequently getting lost in their own governments’ mazelike structures.

None of this is novel to the present historical moment. The great scholar of American politics, David Truman, could write in 1965 that “criticism of the Congress is a hardy perennial of American life,” but he also thought things were looking worse since 1960 than ever before.⁷ Under the auspices of the Trilateral Commission, Michel Crozier, Samuel Huntington, and Joji Watanuki put out a massive report in 1975 called “The Crisis of Democracy.”⁸ Scholars then were concerned with updating the structures of western parliaments to the realities of 20th-century life. When we look out at the problems of today, are we merely rehashing that analysis with a “21st” instead of “20th”?

⁵ Jacob T. Levy, “A Crisis, but Not Just an American One,” *Cato Unbound* (December 9, 2015) (<http://www.cato-unbound.org/2015/12/09/jacob-t-levy/crisis-not-just-american-one>).

⁶ E.g., Robert F. Durant, “The Democratic Deficit in America,” *Political Science Quarterly*, Vol. 110 (1995): 25-47; Susan J. Pharr and Robert D. Putnam, eds., *Disaffected Democracies* (Princeton: Princeton University Press, 2000); Pippa Norris, *Democratic Deficit: Critical Citizens Revisited* (New York: Cambridge University Press, 2011); Patti Lenard and Richard Simeon, eds., *Imperfect Democracies: The Democratic Deficit in Canada and the United States* (Santa Barbara: UCB Press, 2012).

⁷ David B. Truman, editor, *The Congress and America’s Future*, 2nd Edition (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1973, first edition 1965), 1.

⁸ Also see Samuel P. Huntington, “The democratic distemper,” *The Public Interest* (1975) (http://www.nationalaffairs.com/doclib/20080527_197504103thedemocraticdistempersamuelphuntington.pdf).

Anti-institutionalism now looms larger in American politics than at any time in living memory.

There are reasons to think that something is different this time around, especially when we focus on elite discourse, which is markedly less confident in the prospects of reenergizing democracy and markedly more envious of the ease with which undemocratic states seem to achieve their objectives.⁹ Francis Fukuyama's confident prophesying of the liberal democratic system's global dominance in 1990 has given way to a sour reflection on societal decay in 2014.¹⁰ Two editors of *The Economist*, a venerable purveyor of classical liberal ideas for a century and a half, recently argued that western nations' democratic inheritances may be a hindrance in adapting to the challenges of the 21st century political economy and that, consequently, mediocrity may await them. They suggest that a fitting epitaph for an America in ruin may well be: "government of the people, by the people, for the people."¹¹ As I will explore at length below, many scholars of the administrative state are willing to offer more optimistic visions of an adaptable American state, but their optimism is largely rooted in a confidence that an ascendant executive branch will find a way to implement tolerably effective policies for managing social problems *in spite of* intractable democratic dysfunctions and a legislature that is mostly deadweight.

Probably of greater practical importance, at least in the short run, many Republican insiders have come to regard America's current system of governance as irredeemably corrupt—notwithstanding their own central role in that system. As a result, a kind of institutionalized anti-institutionalism now looms larger in American politics than at any time in living memory, as demonstrated by the deposing of Speaker of the House John Boehner in 2015 and the free-for-all presidential primary contest raging as I write. At least in the realm of domestic policy, Republicans have now gotten to the point where expressing any confidence at all in the capacities of the federal government is regarded as a kind of heresy.

The administrative state—generically referred to as “the bureaucracy” or specifically targeted with reference to especially controversial agencies, such as the Environmental Protection Agency (EPA) or Internal Revenue Service (IRS)—often takes on a focal role in discussions of the American government's legitimacy. This probably has something to do with the delayed evolution of America's federal state, which is less deeply rooted and formalized than its European counterparts and which always seems to be scrambling to assemble effective authority.¹² Whereas an elite corps of civil servants seems like an immovable fact of life in France and Germany, Americans feel it to be a recent imposition they might shake off.

Americans' ideal of the bureaucracy is of a value-neutral service provider—which is clearly at odds with the reality of an executive branch that contains the bulk of the government's capacity, not only for implementation but for policy formulation as well.¹³ This is a source of great frustration. Where Americans hope to find clear lines of legal authorization and responsibility in the bureaucracy, they instead confront a tangled expanse of agencies and independent

⁹ For a prominent exemplar of contemporary China-envy, for example, see Daniel A. Bell, *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton, NJ: Princeton University Press, 2015). Authoritarian sympathies have percolated at previous moments in American history, notably in the 1930s; see Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: W.W. Norton, 2013). Of course, that precedent is not exactly reassuring.

¹⁰ Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992); *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014).

¹¹ John Micklethwait and Adrian Wooldrige, *The Fourth Revolution: The Global Race to Reinvent the State* (New York: Penguin Press, 2014), 127. In their conclusion they hedge toward optimism, but the dominant theme of their book is to question whether perhaps the paradigm of western liberal democracies has is running out its thread.

¹² Richard E. Neustadt, “Politicians and Bureaucrats,” in *The Congress and America's Future*, pp. 118-140.

¹³ Brian J. Cook, *Bureaucracy and Self-Government*, 2nd ed. (Baltimore: Johns Hopkins Press, 2014).

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commissions with overlapping responsibilities, obscure funding sources, and large portions of government business contracted out in difficult-to-understand ways.¹⁴ The discovery of the divergence between their ideal of lean, clean government and the messy reality leads many Americans to tune out. The few citizens who dutifully dig into the details often end up equally flummoxed by the confusing lines of responsibility in modern administrative state.¹⁵

None of these frustrations is novel to 21st century America. Indeed, to study the evolution of America's administrative state is to understand the cyclical interplay of expansion and reform, acceptance and backlash. But along with recurrent cycles, there are also some long-term secular trends at work that make it fair to ask whether American citizens' sense of alienation from their government is now greater and more justified than ever before.

THE LEGITIMACY OF THE AMERICAN ADMINISTRATIVE STATE: A CAPSULE HISTORY

In 1973, looking back over the history of thinking about America's administrative state, the great Harvard administrative law scholar Louis Jaffe discerned a “metronomic” oscillation of prevailing views about the virtues of broad delegations of power to the executive that by then already stretched back a full century.¹⁶ Five years later, James O. Freedman noted a similar trend: American administrative law was periodically beset by a series of “crises” focused on the impropriety of concentrating power in the hands of unelected and apparently unaccountable administrators, sometimes inspiring process reforms but never quite achieving an enduring sense of legitimacy.¹⁷ It is worth briefly recounting the cycles that Jaffe and Freedman noted and extrapolating their view into the present before pushing on to consider what kinds of longer-term trends may also be present.

Although many people imagine the administrative state as a post-New Deal phenomenon, its roots are clearly discernible in the late 19th century. At that time, Professor Woodrow Wilson was among the most enthusiastic proponents of delegating undivided power to executive branch actors who could wield it with focus and dispatch, thereby facilitating responsibility rather than a confusing fragmentation of authority. Continuing legislative involvement would only serve to gum up the works, and so a disintermediation was appropriate: the people's representatives would dictate the ends of government but then withdraw from the scene to allow experts to pursue those ends effectively. That kind of thinking was behind the creation of the Interstate Commerce Commission in 1887, the Bureau of Corporations in 1903, the Food and Drug Act of 1906 and, during Wilson's own presidency, the Federal Reserve System in 1913, the Federal Trade Commission in 1914, and then a profusion of dedicated boards and agencies during the Great War.¹⁸

¹⁴ John Dilulio, Jr., *Bring Back the Bureaucrats: Why More Federal Workers Will Lead To Better (and Smaller!) Government* (Philadelphia, PA: Templeton Press, 2014).

¹⁵ To understand the hugely salient response to the financial crisis, for example, the public was forced to track the actions of Congress (and various special oversight bodies it created), the Department of Treasury, Federal Reserve System, FDIC, SEC, CFTC, the quasi- and then ambiguously-more-than-quasi-government housing finance giants Fannie Mae and Freddie Mac, not to mention special White House task forces on the auto industry and executive compensation. For a discussion of the role that opacity and confusion play, see Philip Wallach, *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis* (Brookings Institution Press, 2015), 4-6.

¹⁶ Louis L. Jaffe, “The Illusion of Ideal Administration,” *Harvard Law Review* 86 (1973): 1183-1199, 1184.

¹⁷ James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (New York: Cambridge University Press, 1978).

¹⁸ This last development is well covered in Gail Radford, *The Rise of The Public Authority* (Chicago: University of Chicago Press, 2013).

Whereas Wilson's vision promised concentrated responsibility by combining traditionally separated functions within specialist bureaus and agencies, the reality was that the multiplication of power centers, all of which were given fairly broad remits and unclear limits, created a problem of fragmented power that naturally engendered a reaction. Writing in the 1910s and 1920s, Ernst Freund argued that delegations could only be justified where there was very little political controversy involved. Although most agencies lived on and a few more were created, the Republican presidencies of the 1920s were mostly marked by a return to congressional dominance. And, of course, the most notable source of government activism, alcohol prohibition, came directly from a grassroots movement culminating in the 18th Amendment.¹⁹

The delegation of policymaking authority to executive and independent bodies famously returned with a vengeance during the Great Depression, when the federal government was desperate to produce energetic bodies capable of overcoming the nation's economic malaise. Properly understood, this trend began during Herbert Hoover's presidency, but it certainly mushroomed during Franklin Delano Roosevelt's term. The intellectual justification was provided in large part by James Landis, with "The Administrative Process" (1938) as the centerpiece. Landis frankly argued that giving technocrats broad authorities to operate within their policy areas was the best, and most legitimate, way to address the pressing problems of the day. Under Roosevelt's guidance, executive-dominated government also successfully sought to consolidate authority under the president's control, with the Brownlow Commission in 1937 emphasizing that effective management was to be regarded as the paramount value and leading to presidential reorganization powers granted by Congress in 1939.²⁰ During World War II, this power was used to reshape America's government and indeed entire political economy in ways that had been previously unimaginable.²¹

Roosevelt's empowerment of the executive naturally created suspicions which finally coalesced after his death and the end of the war. The Administrative Procedure Act of 1946 (APA), which originated in hostile reactions to New Deal agencies' broad powers, represented one of the most significant attempts to cabin executive authority. But it was very much a plan to "rescue the new administrative state from its likely defects" rather than an attempt to unmake it.²²

The next generation of scholars surveyed the extent of America's administrative state and thought that the discipline imposed by the APA was insufficient: they began to suspect that the build-up of powers in so many independent bodies had allowed government's powers to be manipulated on behalf of special interests.²³ But because distrust of government in the 1960s extended to legislatures as well as "captured" agencies, reformers on both sides of the political spectrum searched for ways of allowing private citizens (and the "public interest" groups representing them) to wield the power of government enforcement, including by creating "private attorneys general" provisions that allowed citizens to sue to enforce the law.²⁴

¹⁹ For a useful overview, see Randall G. Holcombe, "The Growth of the Federal Government in the 1920s," *Cato Journal* 16 (Fall 1996): 175-201.

²⁰ Brian J. Cook, *Bureaucracy and Self-Government*, 2nd ed. (Baltimore: Johns Hopkins Press, 2014), 140-160.

²¹ Mariano-Florentino Cuéllar, "Administrative War," *George Washington Law Review* 82 (2014): 1343-1445.

²² John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* (Lawrence, KS: University Press of Kansas, 1986), 157; see also Christopher DeMuth Sr., "Can the Administrative State be Tamed?," *Journal of Legal Analysis* (2016): 2-4.

²³ Capture theory was first developed in the 1950s by Samuel Huntington and Marver Bernstein and later given harder ideological edges by Gabriel Kolko, James Weinstein, and Martin Sklar on the left and Gary Becker, George Stigler, and Sam Peltzman on the right. A concise overview is William Novak, "A Revisionist History of Regulatory Capture," in Daniel Carpenter and David A. Moss, editors, *Preventing Regulatory Capture* (New York: Cambridge University Press, 2014), 28-32.

²⁴ Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1669-1813; Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton University Press, 2010).

This development turned out to be an “and” rather than an “or,” however; technocratic government made significant advances once again beginning in the 1970s, with “informal” rulemaking (to be contrasted with trial-like “formal” rulemakings) becoming the major means by which government exercised its power. Kenneth Culp Davis, another great scholar of administrative law, first articulated a romantic vision of rulemaking as “one of the greatest inventions of modern government” in his 1970 treatise, arguing that when agencies consulted with all relevant stakeholders as they formulated their rules they were able to effectively replicate the best aspects of the legislative process while excluding the worst.²⁵ Through rulemaking, agencies could achieve a “synoptic” viewpoint that effectively allowed them to achieve correct answers.²⁶

Since Jaffe and Freedman wrote, there has been another wave of reaction against the technocratic turn. The idea that “public interest” groups were genuinely operating on behalf of some broad public interest became suspect, and a central theme of Ronald Reagan’s transformative presidency was that “government is the problem” in need of solving. Deregulation in the late 1970s and early 1980s operationalized this impulse to some extent.²⁷ But its

reach was distinctly limited; attempts to transform government agencies like the EPA from the inside were largely frustrated.

The last two decades have also seen a simmering reaction against the administrative state that seeks to go beyond incremental disciplining to wholesale rejection.

As with the APA a generation earlier, the most enduring reaction against technocratic government served to refine and discipline its processes rather than reject them in any thoroughgoing way. At the outset of the Reagan administration, the Office of Information and Regulatory

Affairs (OIRA) was called into being to ensure that agencies operated with some respect for economic efficiency, as instantiated through formal cost-benefit analyses. This process reform has proved to be quite durable, but that is in large part because of how seamlessly it can be integrated with the technocratic vision of government.

In the Clinton and Obama administrations, cost-benefit analyses have proven to be useful tools for justifying extensive rulemakings. Indeed, for the leading contemporary defenders of the technocratic administrative state, who argue that executive agencies have come to be the guardians of the modern version of the common law, refinements in the methods of cost-benefit analysis are proof of the increasing fairness and sophistication of the administrative state. Exponents of this view are increasingly comfortable having Congress empower expert bodies in the executive to develop substantive law, as exemplified by the two most important legislative enactments of the Obama administration, the Affordable Care Act and Dodd-Frank Act. Although Democrats controlled both houses of Congress when they passed both of these laws in 2010, they nevertheless conferred unprecedented scope for rulemaking on the executive branch, such that six years later the respective departments are still in the midst of giving substance to these laws. In Section III of this paper, I seek to unpack the commitments of these modern technocrats.

As technocrats have by and large secured their ascendancy, the last two decades have also seen a simmering reaction against the administrative state that seeks to go beyond incremental disciplining to wholesale rejection. The conservative movement that unexpectedly wrested congressional control away from Democrats in 1994 and which has done so much to define the contours of politics in recent years has decidedly immodest (and, one might say,

²⁵ Kenneth Culp Davis, *Administrative Law Treatise: 1970 Supplement* (St. Paul, MN: West Publishing, 1971), 283.

²⁶ Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens, GA: University of Georgia Press, 1988).

²⁷ Martha Derthick and Paul J. Quirk, *The Politics of Deregulation* (Brookings Institution Press, 1985).

rather un-conservative) ambitions regarding the administrative state, which it purports to find entirely illegitimate. To this point, its ambitions have been almost entirely unrealized in spite of its control of the political branches at various points. In Section IV, I argue that conservatives' lack of success is a direct result of their inability to articulate any realistic vision of modern government to contrast with technocracy and their willingness to indulge in an escapist vision of policymaking in which good rules somehow directly emanate from a virtuous citizenry.

Before turning to analyze the commitments of the most recent combatants in the century-long back and forth struggle over the position of the administrative state, we must first take stock at what has changed over that time. Although the debates are largely cyclical, many features of the contemporary scene have been shaped primarily by long-term secular trends, which we can divide into material, intellectual, and institutional.

First, a number of material trends have combined to reduce the relative costs of central administration. As Chris DeMuth has explained, technological revolutions in transportation and information technology have effectively shrunk the nation (and world) from the perspective of aspiring federal regulators. In economic terms, these changes shift the supply curve upward. At the same time, the spread of affluence and the sheer multiplication of our population has hugely increased the potential demand for government involvement—shifting the demand curve upward as well. The equilibrium result is an expanded portfolio for government involvement in private life, explicable without any need for sweeping intellectual revolutions.²⁸ Frank Baumgartner and Bryan Jones have empirically substantiated this trend by showing the proliferation of distinct demands for government policy solutions, especially since the late 1960s.²⁹

Executive branch imperialism has been matched by judicial deference and congressional abdication.

Second, there is far more intellectual support for technocratic problem-solving today than in the past, which one may see as independently causal or merely as a lagging indicator of the material changes wrought over the course of the 20th century. Whereas the federal government's purposes were thought of as being quite circumscribed in 1900, by 2016 it has become natural to consider a federal response to every perceived social ill, from urban traffic congestion to school bullying. This undoubtedly has a great deal to do with the feasibility of seeking federal intervention, but it also reflects a profound change in mindset toward totalized government.³⁰ As government problem-solvers have become a more permanent part of the scene, complete with their own graduate schools and cultural presence, there is also a greater tendency to imagine problems as susceptible to correct solutions that can be (approximately) arrived at by expert deliberation. Courts as well as regular citizens have no trouble imagining a process that takes in all relevant information, and indeed this may be their default mental model of government problem-solving (in spite of its glaring problems).³¹

Finally, just as the intellectual climate has adjusted itself to the seemingly endless stream of policies emanating from the executive branch, so too have America's governing institutions reconfigured themselves on the assumption of executive branch primacy. Put simply: executive branch imperialism has been matched by judicial deference and congressional abdication. Executive expansion, in terms of numbers, internal substantive capacities, and managerial

²⁸ Christopher DeMuth Sr., "Can the Administrative State Be Tamed?," 42-45.

²⁹ Frank R. Baumgartner and Bryan D. Jones, *The Politics of Information* (University of Chicago Press, 2015).

³⁰ See Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985).

³¹ Martin Shapiro, *Who Guards the Guardians?*

capacity has been enormous over the last hundred years. As John Dilulio has highlighted, over the past four decades it has been this managerial capacity which has swelled. The federal government's responsibilities have burgeoned, as has the money it disburses, but federal government employment has stagnated in absolute terms.³² This mismatch has been sustained by an enormous, poorly understood proliferation of government contracts with service providers and consultants whose sole client is the federal government. Whether these relationships function well is an open question, but the fact they have become the lifeblood of government operations is a momentous development in itself. Executive branch agencies, which collectively have several orders of magnitude more capacity than the other branches of government, have learned to consult with "stakeholders" and adjust their practices without any intermediation by the other branches.

Congress has increasingly turned into a facilitator of executive policymaking with its lawmaking

Perhaps inevitably, judges have largely removed themselves from the path of this executive juggernaut, contenting themselves to police its most egregious process abuses on the margins rather than attempting the (probably impossible) task of comprehensively policing its work. In formal terms, this has meant steadily narrowing the meaning of the Constitution's requirement that "all legislative powers" be vested in Congress, allowing the bulk of policy decisions to migrate into the executive with only occasional protests. And, famously among administrative law scholars, it has meant crafting an intricate regime of deference to agency interpretations of the statutes that direct them, which, in practice, tends to prohibit only the most egregious violations of clear legal requirements. There are some signs of a judicial insurgency against this regime by those who are ready to openly dispute the administrative state's basic legitimacy—most notably, Supreme Court Justice Clarence Thomas—but it remains to be seen exactly how effective a check the greatly outgunned and structurally reactive courts can be.³³

Congress has in its own way followed the judiciary in deferring to the executive branch's initiative, a trend which has been especially pronounced since control of Congress became seriously contested in 1980 and even more since Republicans took control after 1994. Congress has increasingly turned into a facilitator of executive policymaking with its lawmaking, and legislators then become professional second-guessers of any problematic results. In our current age of hyper-partisanship, few members care much for protecting the legislature's institutional prerogatives, and as a result it has become almost the expected norm for the executive branch to make the first move in addressing pressing problems through legally-strained interpretations of existing statutes rather than looking to any kind of iterated, incremental legislative process. Symptomatically, executive agencies now often help Congress rewrite legislation by drafting bill text, some of which is enacted with minimal deliberation.³⁴ This loss of congressional functionality leads to a vaguely conceived anxiety among the general public and a veritable sense of despair among elites. In short, the legislature's fall and administrative state's rise is a central piece of our legitimacy crisis.

³² John Dilulio, Jr., *Bring Back the Bureaucrats* (2014).

³³ See Philip Wallach, "Michigan v. EPA: Competing conceptions of deference due to administrative agencies," *FixGov* (June 29, 2015) (<http://www.brookings.edu/blogs/fixgov/posts/2015/06/29-michigan-v-epa-administrative-deference-wallach>).

³⁴ Chris Walker, "Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting," Draft Report to the Administrative Conference of the United States (September 2015) (<https://www.acus.gov/sites/default/files/documents/technical-assistance-draft-report.pdf>).

TECHNOCRATS' NEGLECT OF LEGITIMACY

Today's technocrats nevertheless take the administrative state's side in the ongoing cyclical struggle over its legitimacy and reconcile themselves to the long-term changes to our system of government that have accumulated. They think that the evolution of America's state has proceeded rather smoothly, thanks in large part to the efforts of many thousands of dedicated public servants. Naturally, they admit that many features of the current regime might be improved, but they suspect that most people who seriously doubt its legitimacy are not basing their concerns on any real deficiencies of the system. Instead, they think that critics harbor irrational suspicions of government capacity, hugely exaggerate the seriousness of abuses in the current system, and fail to appreciate the difficulties that radical reconfigurations would entail. I will shortly argue that this dismissive attitude is understandable, given the arguments that the administrative state's detractors tend to rely on, but in this section I seek to explain why technocrats' orientation toward legitimacy—characterized largely by neglect—is deeply problematic.

NAKED TECHNOCRATS

To illustrate contemporary technocrats' orientation toward legitimacy, it is useful to start with an extreme member of their ranks: Adrian Vermeule. In some ways, Vermeule is an outlier among the technocrats. He was a Scalia clerk and is a creature of the political right, as well as being an avowed formalist, all of which are unusual characteristics for full-throated defenders of the administrative state. But Vermeule's formalism is limited by his willingness to concede that law frequently runs out before providing enough guidance to determine concrete decisions, at which point he becomes a staunch defender of the executive branch's superior capacity to act reasonably and with sensitivity to the public's desires.³⁵

For Vermeule, government legitimacy is almost entirely a function of public perceptions of government outcomes, which means that what matters in practice is what the administrative state ends up doing and whether it serves people's interests adequately. This attitude is entirely typical of today's technocrats, even if Vermeule presents it in an unusually stark form.

In "The Executive Unbound," Vermeule and coauthor Eric Posner savagely attack the notion that government legitimacy depends on adherence to the forms of what they call "liberal legalism." This hard-to-pin-down "complex of theoretical views and institutional commitments" is central to "mainstream Anglo-American legal theory," includes elements of constitutionalism and deliberative democracy, and is centrally concerned with the idea "that law does and should constrain the executive."³⁶ By their lights, if ever these ideas had any strength, in the era of modern government they have become empty pieties, and anyone who wants to see clearly should move past them.

Instead, we should adopt an attitude that maximizes the scope for beneficial government flexibility on the public's behalf, which mostly amounts to trusting the actors in the executive branch whose knowledge of policy is most detailed and nuanced and who can directly interact with affected parties and citizens so as to know how best to balance their needs. Rather than prattling on about the rule of law and the like, those worried about the state's legitimacy ought to turn their attention to concrete policy areas, where they will most often find something approximating

³⁵ Adrian Vermeule, *Judging Under Uncertainty* (Cambridge, MA: Harvard University Press, 2006), 208-214, 225.

³⁶ Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010), 3.

a “well-motivated executive who chooses the policies that voters would choose if they knew what the executive knows.”³⁷ If the executive should stray far from that sensible course, it will find itself politically constrained.

There are left-flavored variants of Posner and Vermeule’s open contempt for “legal liberalism.” Edward Rubin’s “Beyond Camelot” anticipated their frankly dismissive attitude toward the rule of law.³⁸ Rubin argues that nostalgic, pre-modern concepts—including democracy, legitimacy, law, and rights—blind us to the considerable merits of the administrative state, which has become an immovable brute fact. In Rubin’s view, the reality of modern government has little to do with the three-branch structure of our Constitution, and is instead better described as a complex network interconnecting many kinds of nested subunits; once this perspective is adopted, the stark distinction between public and private implied by the word “government” itself becomes questionable. Asking about citizens’ feelings about government legitimacy in this context is bound to be misleading; for Rubin, the only important question is whether people in fact comply with the commands of government. In spite of their complaints, they mostly do. And as long as an expected stream of public services is delivered, a lack of broader “religious” reverence for the state is of no concern.

Posner and Vermeule and also Rubin think the executive branch’s adaptability and capacity to interface with stakeholders make intermediation through non-executive actors at best superfluous and at worst a serious impediment to effective government. Ever willing to provoke, Vermeule has now embraced the logical conclusion of this line of thinking, arguing that simply abolishing Congress would improve American government.³⁹ These authors feel comfortable openly embracing executive-centered government because they are thoroughly unworried by the question of whether a bureaucracy-led government is bound to have legitimacy problems. As I have explored elsewhere, there are powerful reasons to think that a state whose main mode of action is disconnected administrative action is likely to be legitimate only inasmuch as its actions succeed in satisfying citizens’ expectations, with disappointments becoming destabilizing to the whole system.⁴⁰

Posner and Vermeule occasionally seem to recognize the limitations of their position, and at a few points they limply gesture at the wisdom of noble lies or “veneers” of respectfulness for the masses’ anachronistic sensibilities.⁴¹ But more often they, and Rubin as well, seem to have a deep trust in the goodwill of executive actors, who they assume will do their best (subject to constraints of limited knowledge) to pursue optimal policies as benefits the public. For their model of policymaking, there are no deep disagreements about the purposes of government, nor irreconcilable differences between different groups; in short, there is every reason to think of “politics” as a dirty word.

For anyone who is at all cognizant of political climate in 2016, it is simple to see that majorities of the public (in America but apparently in many other countries as well) lack this kind of trust in government and belief in the possibility of apolitical administration. Posner and Vermeule, and to a lesser extent Rubin, stand ready to meet their disbelief with open ridicule. Those who think that we can have something other than technocratic government are just deluding themselves, they say, and those who stoke fears of serious executive abuse suffer from “tyrannophobia,”

³⁷ Posner and Vermeule, *The Executive Unbound*, 130.

³⁸ Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton: Princeton University Press, 2005).

³⁹ Adrian Vermeule, “Imagine there’s no Congress,” *Washington Post* (January 11, 2016) (<https://www.washingtonpost.com/news/in-theory/wp/2016/01/11/imagine-theres-no-congress/>). Vermeule is hardly alone in indulging in this kind of thought experiment lately. E.g., see Aaron Goldzimer and David Gamage, “Forget Congress and let the Fed handle tax rates,” *Los Angeles Times* (April 6, 2016) (<http://www.latimes.com/opinion/op-ed/la-oe-0406-goldzimer-gamage-fed-set-tax-rates-20160406-story.html>).

⁴⁰ Philip Wallach, “Government Decoherence and Its Discontents,” *Liberty Law Forum* (September 1, 2015) (<http://www.libertylawsite.org/liberty-forum/government-decoherence-and-its-discontents/>).

⁴¹ Posner and Vermeule, *The Executive Unbound*, 103.

which Posner and Vermeule diagnose as an irrational and ahistorical strain of thinking that is unfortunately common in America but wholly without value to our society. In other words, they casually devalue what is surely the most effective rhetorical weapon against high-handed government.

These naked technocrats' willingness to hold themselves aloof from dominant sensibilities ensures that theirs will be a fairly limited influence. To members of the academic-intellectual-bureaucratic set they offer a reassuring, self-affirming mantra: if only mandarins believe in the worthiness of the meritocratic, rational system of which they are a part, and openly give their support to it, it will endure and flourish. Never mind the signs that this group is more isolated from the general public than in past times; and never mind the gross indications that legitimacy problems framed squarely in the old terms are capable of degrading the efficacy of policymaking. For some of the intended audience this message will be convincing and even liberating; for many more, it seems willfully blind to current legitimacy problems.

TECHNOCRACY IN DEMOCRATIC GARB

By far the more common and influential way to defend technocracy is to offer elaborate explanations of how it can, should, and does achieve democratic legitimacy.⁴² Two main strands of justification coexist, sometimes quite uneasily. If technocrats can be viewed as wholly subordinate to democratic decision-making, then surely they pose no threat to it. Alternatively, if process requirements lead to all-things-considered optimal decision-making, then it seems hard to see why technocrats' authority should run into any democratic legitimacy problems. On the one hand, technocrats are subservient to democratic choices; on the other, if they demonstrably use appropriate decision-making procedures, then we can be confident their choices are the best available to us to maximize the common good.

The tensions here ought to be clear: are technocrats mere servants of the democratic will, or are they problem-solvers making use of a more expansive independence on behalf of what they apprehend as the good? If democratic forces push toward what seem to them to be sub-optimal policies, should they accept their charge or steer things in better directions? Which is to be supreme: messy politics or tightly reasoned policy development by experts?

Are technocrats mere servants of the democratic will, or are they problem-solvers making use of a more expansive independence on behalf of what they apprehend as the good?

The achievement of today's leading technocrats, Justice Stephen Breyer and Cass Sunstein, is to manage these tensions and conceal them from public view: to clothe technocracy in a convincing democratic garb. Both have sold judicial modesty and deference as quintessentially democratic values, even when the deference in question is to technocrats acting in ways not clearly guided by any exercise of democratic will. And both have sought to emphasize the inclusiveness of technocrats' regulatory processes to show they are fully consistent with democratic values.

⁴² Or, better yet, if we have faith in the goodwill, competence, and public-spiritedness of administrators, then we should value them as faithful Constitutional interpreters rather than as mere technocrats and welcome their policymaking leadership. This view is most enthusiastically laid out by John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* (Lawrence, KS: University Press of Kansas, 1986). This approach requires wishing away our current legitimacy troubles, not to mention adopting a fantastically rosy view of bureaucrats, and so its influence has been limited.

A bevy of Breyer opinions and dissents over the years make it clear that he thinks it is crucial to let regulatory experts be the ones to dictate how policy develops.⁴³ This is an unsurprising, given Breyer's distinguished career as a legal scholar of regulation before he took to the bench. But rather than openly embrace technocracy, Breyer has presented himself as a champion of democracy, especially in his "Active Liberty" (2005). There, he argues that our Constitution's commitment to democracy is realized not through Athenian-style direct participation but with "delegated democracy" that "need not represent a significant departure from democratic principle" so long as it fosters "connections" to the public "that involve responsibility, participation, and capacity."⁴⁴ In other words, power will be delegated to the administrative state's technocrats, who will earn legitimacy through some degree of ex post accountability, openness to direct citizen participation, and demonstrated expertise.

Naturally, Breyer also acknowledges the importance of bureaucrats' ultimate responsibility to comply with the enactments of the legislature—but he is adamant that non-expert judges, who possess an inferior ability to grasp the totality of circumstances, should be cautious in determining that technocrats are transgressing against statutory requirements. In a piece that hails Breyer's evolution "From Technocrat to Democrat," Sunstein argues that Breyer "was both a technocrat and a democrat (in the sense of an advocate for judicial modesty). Indeed, he was a democrat in significant part because he was a technocrat."⁴⁵ The legislature, generally thought of as the specialized intermediary between the public and the government, tends to fade from the picture as its enactments are read in the least constraining way possible.

Nevertheless, we are to feel democracy not only as present, but as thriving in the delegated realm of executive policymaking because of rulemaking's formal notice and comment procedures that give citizens a forum to be heard by technocrats. Few lay citizens manage to meaningfully participate through the comment process, but Breyer and Sunstein are unworried that relying on this esoteric channel of legitimation will cause any problems, because its formal openness seems to prove its "democratic" nature. But as Ken Kersch argues: "to identify this managed, elite-inflected openness with the more unruly forms of democracy associated with democracy in its 'participatory' form, and that Tocqueville was describing in his account of Jacksonian America, is quite an audacious move."⁴⁶ To justify the rulemaking process as democratic in any inclusive sense, even when the law provides little guidance, strains credulity. To justify it as a reliable producer of apolitical, sound results will work only when the broader public is inclined to trust in technocrats' objectivity, a condition now mostly unfulfilled.

Sunstein, who is surely the subtlest and most prolific defender of our modern technocracy, has sought to bolster the executive branch's reputation as an apolitical problem-solver in several ways. First, he has tried to demonstrate that, in crucial administrative law cases, the judiciary is badly politicized, implying that judicial attempts to police executive discretion will simply add another political power struggle to the policymaking process. The solution, unsurprisingly, is more deference to the executive.⁴⁷ The logic, hard to swallow, is that if only courts would leave administrators alone the executive would actually become more trusted. It isn't clear why Sunstein thinks politics ought to stop at the government's edge, let alone why he thinks the American people are likely to believe that it already does.

⁴³ To point to just two, see Breyer's dissent in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), and his concurrence in *UARG v. EPA*, 134 S.Ct. 2427, 2449 (2014). For a recent statement of Sunstein's preference for executive branch experts, see Cass Sunstein, "The Most Knowledgeable Branch," forthcoming in *University of Pennsylvania Law Review* (draft at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2630726).

⁴⁴ Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005), 23, 16.

⁴⁵ Cass Sunstein, "From Technocrat to Democrat," *Harvard Law Review* 128 (2014): 488-497, 489.

⁴⁶ Ken Kersch, "Justice Breyer's Mandarin Liberty," *University of Chicago Law Review* 73 (2006): 759-822, 801, also see 818-20.

⁴⁷ Cass Sunstein and Thomas Miles, "Depoliticizing Administrative Law," *Duke Law Journal* 58 (2009): 2193-2230.

Second, Sunstein has done yeoman's work in guiding the refinement of cost-benefit analysis, which offers what he sees as a uniquely persuasive language for justifying technocrats' claims to produce societal good. To the extent that cost-benefit analyses can transparently weigh all important concerns—again, with a democratic inflection, because agencies will open their doors to all who wish to educate them—they will allay any concerns of political gamesmanship. The methods of cost-benefit analysis are themselves open to challenge, and Sunstein has been remarkably receptive to suggested improvements. To oversimplify, when detractors of cost-benefit analysis (who come in both left and right varieties) point out something it leaves out, technocrats including Sunstein have been quite nimble in devising ways of incorporating the suggested factors. They openly admit the imperfection of prospective analysis, but submit that they are offering the best rational assessment possible at the time, and can add in both retrospective analysis and randomized control trials as supplements.⁴⁸ If some aspects of regulatory effects are vexingly difficult to quantify, they assert that making a reasoned go at it is the best we can hope for.⁴⁹

These responses to concerns about cost-benefit analysis are workmanlike and convincing if taken on their own terms—but, of course, therein lies the problem, because if one suspects that the people determining the nature of the analyses are biased in some important way, refinements may not be responsive to their concerns. From the non-trusting perspective, mixing in new concerns among old ones does not prove that they have been taken seriously enough; the suspicion is that fundamental political differences about tradeoffs are just being concealed within apparently neutral mathematical formulae.

Meanwhile, heavy reliance on purportedly objective cost-benefit analysis has another downside: by suggesting there is a single right way to think about the worthiness of a policy, it forces people to endlessly contest what that way is, precluding room for principled compromise among people who do *not* agree. Rather than an open-ended search for mutual, good-enough accommodation, cost-benefit pushes technocrats to oversell their policy choices as uniquely dictated by expertise or “Science,” and this is often rightly perceived as usurpation or hubris.

A third justificatory strategy flows from this need to prove one's own unimpeachable rationality: discrediting one's opponents as driven by bias. Sunstein has drawn on behavioral economists' to add “behavioral market failures” to potential justifications for regulation. Basically, the argument is that when people object to government interventions, it is often because they overestimate their own ability to make choices that are in their best interest.⁵⁰ This argument is sometimes subtly adjusted to rebuff technocracy's critics: if people reject the rational, apolitical (but democracy promoting!) thinking of our technocrats, they are probably caught in a filtered information system that precludes them from seeing things more clearly.⁵¹ Others have also caught onto this technique, arguing that democratic theory itself needs to be adapted (not surprisingly, in technocrat-friendly ways) in order to assimilate the wisdom of the behavioral economists.⁵² This makes for a clever rhetorical strategy, but it basically assumes the conclusion that those who claim mastery of cutting edge scientific techniques should be treated as privileged knowers of the public good. Technocrats' sympathizers will solemnly nod their heads, but their critics will rightly feel they are being

⁴⁸ Cass Sunstein, “Cost-Benefit Analysis and the Knowledge Problem,” Regulatory Policy Program Working Paper RPP-2015-03. Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School (http://www.ksg.harvard.edu/index.php/content/download/74034/1678745/version/1/file/RPP_2015_03_Sunstein.pdf). For a shorter version, see Cass Sunstein, “Democratizing Regulation, Digitally,” *Democracy* (Fall 2014) (<http://democracyjournal.org/magazine/34/democratizing-regulation-digitally/>).

⁴⁹ Along similar lines: Cass Sunstein, “The Limits of Quantification,” *California Law Review* 102 (2014): 1369-142; and Cass Sunstein, *Risk and Reason: Safety, Law, and the Environment* (New York: Cambridge University Press, 2002).

⁵⁰ Cass R. Sunstein & Richard H. Thaler, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008); Cass R. Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (New Haven, CT: Yale University Press 2014).

⁵¹ Cass Sunstein, *republic.com* (Princeton, NJ: Princeton University Press, 2001).

⁵² Jamie Terence Kelly, *Framing Democracy* (Princeton, NJ: Princeton University Press, 2012).

dismissed as simpletons rather than having their concerns taken seriously. It is therefore hard to see how this kind of justification can provide a viable path to broader democratic legitimacy.

An alternative means by which technocrats' work can acquire democratic legitimacy (pursued by neither Breyer nor Sunstein) is to borrow it from their nominal boss at the head of executive branch, the president. Because the president is the one American political figure selected by the nation as a whole, he can lay claim to an unmatched plebiscitary legitimacy—a mandate. According to Elena Kagan (then a veteran of several years as a lawyer in the White House), when the president directly asserts authority over and responsibility for the output of various executive agencies this “renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.”⁵³ According to this argument, the president is likely to steer agency technocrats for his own political purposes, but this inevitable injection of politics actually increases their legitimacy because these unelected administrators will thereby become accountable to the president, the people's most direct representative.⁵⁴

For this method of legitimation to work, we have to make two assumptions, both of which are shaky. First, we must believe that winning the national vote makes the president an appropriately representative figure. For issues that lack the salience to figure heavily into our modern version of presidential politics—and, in light of this year's three-ring circus, that may well include *most* issues in the administrative state's purview—it is hard to see why the president is supposed to be such a good representative of the public. For those rare voters who would base their vote on a candidate's regulatory positions, the complex bundles of issues on offer may make accountability on any issue difficult to achieve.

None of the various attempts to clothe technocracy in democratic garb has ultimately succeeded.

Second, and more important, we must make some rather heroic assumptions about the president's ability to personally oversee the work of the administrative state if his legitimacy is to flow down into its work. Ironically, many of those who might wish to employ this justificatory strategy are extremely dismissive of the unitary executive

theory, which insists on the constitutional necessity of thinking of the executive branch as one solid unit. Borrowing the president's democratic legitimacy may well be one of the better ways for technocrats to politically justify their work—but this is an indication of the seriousness of the administrative state's legitimacy problem rather than a reliable, steady source of support. When presidents face their own problems, it may prove an especially weak basis.⁵⁵

One last strategy for justifying the administrative state deserves notice. Recently there has been a boom in historical scholarship showing that America's administrative state has deeper roots and has worked harder to secure its own independent legitimacy than most people realize. To those who question the contemporary administrative state's legitimacy, these historians offer accounts of a long historical evolution, dating back to the 19th century, which has generally produced good results and has proven adaptable when faced with serious concerns.⁵⁶ Far from showing indifference to concerns about unaccountable administration, those who oversaw the growth of administrative power

⁵³ Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245–2385, 2252.

⁵⁴ Jerry Mashaw, “Prodelegation: Why Administrators Should Make Political Decisions,” *Journal of Law, Economics, and Organization* 1 (1985): 81–99, 95. One might also see OIRA as a tool of presidential control, and therefore a source of democratic legitimacy.

⁵⁵ See Wallach, *To the Edge*, 85–86, discussing the sharply limited ability of President George W. Bush to provide legitimacy to the dramatic executive-branch-led responses to the financial crisis in 2008.

⁵⁶ Jerry Mashaw, *Creating the Administrative Constitution* (New Haven, CT: Yale University Press, 2012).

in the first decades of the twentieth century made sure it was shot through with legal formalism designed to ensure protection of individual rights and observance of due process.⁵⁷

With this impressively researched evidence on the record, these scholars suggest that modern critics are simply hyperventilating and would be cured by knowing their history better. Aside from being rather too esoteric to bolster legitimacy in wider debates, these arguments seem to largely wish away the problem: they assert that past efforts at legitimating the administrative state should be sufficient, but quite apparently they *are* not. As Jeremy Kessler convincingly argues, the kind of lawyerly steps taken to secure legitimacy among the community of elite American lawyers were always rejected as overly sterile by other important communities. There never was any “entente” in which the administrative state’s legitimacy was definitively established. Instead, the cyclical struggle discussed above has raged on, and in some ways intensified in recent years. The formal processes that gave rise to the “rule of lawyers” might well be seen as a cause of current legitimacy problems rather than a cure.⁵⁸

In short, none of the various attempts to clothe technocracy in democratic garb has ultimately succeeded. And as we saw above, it is hard for technocrats to establish legitimacy in their own right by simply asserting that they are the best that people can hope to do. Citizens not already inclined to trust technocrats are inclined to view their pretensions to objectivity with suspicion, and doubt their ability to be properly self-critical. Technocrats are clearly rich in information, but their critics suspect they are often poor in understanding and complacent in their own ways of thinking.

Sensing these flaws, the most common response is a total rejection of expertise and a full-blown Jeffersonian affection for democratic control. If technocrats seek to supervene rule by the people, then the people must find ways to outmaneuver and displace them. Unfortunately, most of the populist ways of thinking engendered by a suspicion of technocrats are fantastic and self-defeating.

MISDIAGNOSES AND OVERREACTIONS

Political screeds and scholarly volumes warning of the demise of the American republic are a staple of American political culture, not a novelty. But these are boom times for the genre, which is currently thriving on both the left and the right. The technocratic administrative state is at the center of many of these accounts, which usually express alarm over the executive branch dominance that technocrats are so sanguine about.

Such critiques have been developing for many years, but the political climate of 2016 makes taking them seriously especially urgent. The divergence between America’s ideals and its practice has apparently widened enough to inspire a sustained outburst of “creedal passion,” to use Samuel Huntington’s term. Huntington expected such eruptions every three generations, with profound consequences for the shape of government.⁵⁹ Just about fifty

Can our government today fairly be characterized as “of the people, by the people, for the people?”

⁵⁷ Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900-1940* (New York: Oxford University Press, 2014).

⁵⁸ Jeremy K. Kessler, “Book Review: The Struggle for Administrative Legitimacy,” *Harvard Law Review* 129 (2016): 718-73.

⁵⁹ Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge, MA: Belknap Press of Harvard University Press, 1981). For a useful parsing, see Lee Drutman, “This 1981 book eerily predicted today’s distrustful and angry political mood,” *Vox* (January 6, 2016) (<http://www.vox.com/polyarchy/2016/1/6/10725086/promise-of-disharmony>).

years out from the upheaval of the late 1960s, we may be slightly ahead of schedule in the 2010s, but there can be little question that the American public looks ready to upend many aspects of their government, including many features of our administrative state.

Can our government today fairly be characterized as “of the people, by the people, for the people?” When they look at how our various policymaking agencies actually operate, many critics of different political stripes are convinced that they do not. Depending on how they diagnose the malady, they propose different cures, none of which is entirely on target.

PRESIDENT-SPECIFIC CRITIQUES

Many of these books gesture at larger historical trends but are primarily framed as indictments of a particular administration, which they identify as uniquely guilty of abusing the administrative state to advance its own ideological purposes. Books about the George W. Bush administration accused it of cultivating an opaque and irresponsible “national security state,” seeking to marginalize Congress through use of signing statements, and generally bullying the other branches through use of dubious fear-mongering.⁶⁰ “The administrative state” and “technocracy” are not the labels used to identify the concerns in such books, but their worries are adjacent: executive branch actors claim uncontested expertise as a way to relieve themselves of any real democratic responsibility in justifying policy choices. These books made clear that Bush and especially Vice President Dick Cheney were themselves pivotal actors in turning to a strategy of executive aggrandizement.

A newer crop of books identifies President Obama’s administration as reaching unprecedented heights of executive arrogance.⁶¹ They point to Obama’s willingness to circumvent Congress on a wide range of issues by misusing existing statutes or simply ignoring their clear requirements, resulting in a devaluation of the rule of law and a corresponding diminishment of democratic control. Like the earlier Bush indictments, the case against the Obama administration rests on the idea that the president and his inner circle are improperly motivated by their own sense of righteousness to override any democratic opposition to their policies, and that if only a more tradition-revering president could be found, all could be made right.

On the one hand, these person-focused books offer up an appealingly modest sort of remedy for the contemporary administrative state’s legitimacy problems: get a better president. Being able to offer a prescription that is actually politically attainable is a real virtue, which many of the administrative state’s critics lack. But on the other hand, there is something almost comically myopic about assigning to any individual (or even small set of individuals) responsibility for a trend that clearly spans many decades and administrations. There were books blaming the runaway administrative state and the demise of the rule of law on President Bill Clinton, and it is a fair bet that there will be books blaming the 45th president in much the same way. But we need to look deeper than this; if it is a matter of the voters continually sending the wrong people to the White House, we must ask why they do so.

⁶⁰ Charlie Savage, *Takeover: the return of the imperial presidency and the subversion of American democracy* (New York: Little, Brown, 2007); John P. MacKenzie, *Absolute power? How the unitary executive theory is undermining the constitution* (Washington, DC: Century Foundation Press, 2008); James P. Pfiffner, *Power play: the Bush presidency and the Constitution* (Washington, DC: Brookings Institution Press, 2008);

⁶¹ Phil Kerpen, *Democracy Denied: How Obama is Ignoring You and Bypassing Congress to Radically Transform America - and How to Stop Him* (Dallas, TX: BenBella Books, 2011); David Bernstein, *Lawless: The Obama Administration’s Unprecedented Assault on the Constitution and the Rule of Law* (New York: Encounter Books, 2015).

INSTITUTIONALIST CRITIQUES AND UNREALISTIC REFORM DEMANDS

A more probing strain of criticism sees presidentialism swallowing up American politics regardless of which party or person controls the presidency. Consequently, the separation of powers that had produced a healthy equilibrium of social forces is now failing to operate. Presidents exploit moments of emergency to push through partisan agendas, and American politics produces corrupt results that the public rightly regards as illegitimate.⁶² In these accounts, the administrative state is suspicious because it functions as a tool of the president's unilateralism.

Note that this runs directly counter to one of the arguments above, which was that the administrative state can successfully borrow the president's democratic legitimacy and thereby overcome its apparent insulation—clearly the president cannot confer plebiscitary legitimacy to administration if he is viewed as fundamentally untrustworthy or corrupting. To the extent we believe the latter (all too plausible in this particular political season), the prospects for achieving broad legitimacy for the actions of the administrative state seem grim, indeed. If the president is an unstoppable hijacker, perhaps worrying about the administrative state's particular legitimacy problems is just a matter of rearranging deck chairs on the Titanic.⁶³ Many of these books do indeed seem to counsel despair, as it seems very difficult to understand how the executive might be dislodged from its central place in policymaking today.

But there are those who think it very much a live possibility, if only we would fight the good fight. The most persistent voice here has been Gary Lawson, who has been denouncing the administrative state as constitutionally impermissible for several decades.⁶⁴ As Lawson sees it, if there are judges who properly apprehend the nature of our constitutional deformity, they should waste no time in rushing the country to the operating table for an amputation of the whole administrative state that has developed since the New Deal. As David Schoenbrod sees it, these judges can completely shut down delegation from Congress to the executive and thereby force Congress to make all policy decisions. He argues that this would restore clear lines of accountability to politicians, allowing voters to effectively police their decisions.⁶⁵

For those who doubt that judges bold enough to stand strong against administrative creep are likely to emerge (which includes Lawson), Charles Murray has recently suggested that the people at large can do the job themselves through a widespread campaign of civil disobedience against the overreach of federal regulators.⁶⁶ Because the administrative state's enforcement capacity is nowhere near sufficient to compel compliance in the face of massive defiance, its power will be laid low, comparable to the status of its diminished legitimacy. At that point, the people themselves can begin to refashion a reasonable legal order on their own terms.

The most impressive scholarly attack on the administrative state's legitimacy to date is undoubtedly Philip Hamburger's "Is Administrative Law Unlawful?" Hamburger mounts a sustained assault on the administrative state as inconsistent

⁶² Gene Healy, *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* (Washington, DC: Cato Institute, 2008); Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009); Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010); F.H. Buckley, *The Once and Future King: The Rise of Crown Government in America* (New York: Encounter Books, 2014); Jay Cost, *A Republic No More: Big Government and the Rise of American Political Corruption* (New York: Encounter Books, 2015).

⁶³ Ackerman, in particular, envisions that a politicized presidency and politicized military will soon lead to a coup.

⁶⁴ For a succinct version of his argument, see Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1231-54.

⁶⁵ David Schoenbrod, *Power Without Responsibility* (New Haven: Yale University Press, 1993).

⁶⁶ Charles Murray, *By The People: Rebuilding Liberty Without Permission* (New York: Crown Forum, 2015). For a full review, see Philip Wallach, "Thoreau on the Potomac," *The New Rambler Review* (November 2015) (<http://newramblerreview.com/book-reviews/political-science/thoreau-on-the-potomac>).

with Anglo-American traditions of liberty, arguing that the way the modern executive exercises power has come to resemble the royal prerogative of the Star Chamber. This unchecked power profoundly disrupts our constitutional order, and exposes us to “the danger that administrative law has been the means by which a powerful class has enthroned its own authority within the form of republican government.”⁶⁷ As Hamburger sees it, the administrative state’s meager efforts at legitimation are non-starters, because they do not include any real element of consent. Americans must, as a people, rouse themselves from the delusion that we can live peacefully with administrative law: “at stake is the modernized character of American society and how the law responds by protecting freedom through and under the law.”⁶⁸

Each of these critiques of the administrative state lands some heavy blows, and yet all share a crippling common defect: those they look to as potential champions against the administrative state’s depravities seem to have almost no interest in answering their calling, nor does there seem to be much in political energy ready to be deployed on these issues. As a result, there is something rather empty about the calls for the dawning of a new anti-administrative age. One can try, as Murray does, to conjure up a willing citizenry ready to take to the battlements over these issues, but that exercise seriously strains credulity. One can call into service judges or legislators, but they seem quite confident the massive reform demanded is nowhere in their job descriptions. Or one can try to breathe life into a dormant but venerable intellectual tradition and thereby shift paradigms, as Hamburger does.

In aiming for such a fundamental shift in thought, Hamburger nods to the immensity of the revolution he is calling for—but it isn’t clear he has fully grasped what is required to turn away from some 120 years (or perhaps even longer) of administrative practice that all three branches of government have embraced. This defect was made evident in his recent, remarkably heated exchange with Adrian Vermeule. Vermeule accuses Hamburger of understanding very little about the actual practice of administrative law, its methods of justification, and its community of practitioners.⁶⁹ Hamburger responds that his distance from that community is intentional, given his deep rejection of its underlying assumptions; by his lights, if others do not join him in that rejection, it will mean the end of republican government.⁷⁰

The technocrat and legal historian are clearly talking past each other. If one asks, “Is the current shape of our administrative state consistent with our ancient Anglo-American traditions of liberty?” Hamburger is persuasive that the answer is no. But if one is principally concerned about legitimating our government today, Vermeule rather effectively (if archly) makes the case that nobody much cares about the historical question. Among the legions of well-adjusted lawyers out there in America, not to mention judges, the idea that we can redo the last one to two hundred years of administrative development is a serious nonstarter. Although ordinary citizens are suspicious of the administrative state and vaguely doubt its legitimacy, it is far from clear they are prepared to wage a costly wholesale revolution against it in the name of the rule of law.

⁶⁷ Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 10-11, see also 324, 344, 361.

⁶⁸ Hamburger, *Is Administrative Law Unlawful?*, 496.

⁶⁹ Adrian Vermeule, “No: Review of Philip Hamburger, *Is Administrative Law Unlawful*,” *Texas Law Review* 93 (2015), 1547-66. See also Cass R. Sunstein and Adrian Vermeule, “The New Coke: On the Plural Aims of Administrative Law,” forthcoming in *Supreme Court Review* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631873).

⁷⁰ Philip Hamburger, “Vermeule Unbound,” forthcoming in *Texas Law Review* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691181&download=yes).

RAW POPULISM

Indeed, the nature of our current anti-establishment eruption suggests that, far from wanting to return to ancient English traditions of liberty-preserving institutions as a way of combating unaccountable government, as Hamburger does, many Americans are turning to cruder forms of populism in which institutional details fade from the picture entirely. Those who feel they “don’t have any say” in the current system imagine wholesale change in our processes that will orient government toward their needs.⁷¹ In such visions, if only the public wills its own empowerment, it can have its way “immediately”—both in the sense of change occurring without delay, and in the sense of having “government by the people,” without the need for intermediating, corrupting institutions. The policy preferences of the public will be realized rather than ignored.

Many Americans are turning to cruder forms of populism in which institutional details fade from the picture entirely.

This idea that government should mirror its people, faithfully reflecting their interests and ideals as it seamlessly translates them into praxis, is perennially appealing in its apparent cleanliness. In the history of American political thought, there are periodic recurrences of Jefferson’s idea that each generation must find a way to invent its government anew if it is to be properly reflective of their desires. Put another way, the dream is that government is to be a descriptive representation of the people: a portrait-in-miniature of the society in which no groups or ideas have outsized influence.⁷²

This idea of representation creates unrealistic expectations for both citizens and the state. It supposes citizens can and do have positions about the whole vast range of government activity, when in fact not even well-informed and unusually civic-minded citizens can meet this demand. At the same time, it supposes that government actors have some reliable way of ascertaining citizen preferences without ever specifying exactly what that might be. While one can think of a few unusually clear and discrete issues on which opinion polling might provide some rough approximation of this ideal (e.g., abortion law), most issues of policy are sufficiently complex and entangled in a larger whole to make the idea of fidelity to lay preferences almost totally incoherent.

Far from leading toward some meaningful instantiation of self-government, fixating on having policies that directly channel citizens’ desires effectively excludes them from policymaking. This is because citizens’ needs can only be effectively registered through some process of intermediation, but the desire for immediacy promotes governmental processes that try to dispense with intermediaries, which sometimes leaves citizens effectively mute.⁷³ Government

⁷¹ Donald Trump’s appeal, in particular, is strongest among those who feel our current processes ignore their voices. See Michael Pollard and Joshua Mendelsohn, “RAND Kicks Off 2016 Presidential Election Panel Survey,” *The RAND Blog* (January 27, 2016) (<https://www.rand.org/blog/2016/01/rand-kicks-off-2016-presidential-election-panel-survey.html>), Figure 6.

⁷² This view has become remarkably pervasive among many contemporary political scientists, who suppose it to be self-evident that ordinary citizens possess well-defined preferences (knowable through opinion polling) over a complete menu of policy choices, and that to the extent our political system fails to honor these preferences its claims to democratic legitimacy should be regarded as suspect. Three celebrated exemplars are Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton University Press, 2008); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton University Press, 2012); and Nick Carnes, *White Collar Government: The Hidden Role of Class in Economic Policy Making* (University of Chicago Press, 2013).

⁷³ As Hanna Pitkin put it: “If we are interested in information about the public, the ideal of perfect reflection or resemblance does no harm, but if our concern is with political action by our representatives, the idea of accuracy is likely to mislead.” Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 89, also see 83.

Populists want to empower citizens to govern themselves directly, but the problem is that citizens are neither willing nor able to take on this job.

“by the people” thus often becomes a distracting and largely incoherent slogan that makes it harder to achieve the best possible approximation of that ideal.⁷⁴

The consequence is deeply ironic: populist ideals of democracy end up creating conditions in which technocracy can easily crowd out politics. Democratic idealism goes hand in hand with cynicism about demo-

cratic practice: people desire “a democracy too good for politics,” and when reality disappoints “the demos turns to fugitive escape.”⁷⁵ Populism ends up bundled with empowerment of “apolitical” technocrats precisely because they promise the ability to transform popular will directly into realized outcomes with the addition of purely technical expertise, although in practice their decisions will always contain significant political components.⁷⁶

Populists want to empower citizens to govern themselves directly, but the problem is that citizens are neither willing nor able to take on this job. Nor is it clear they should be; although our civic culture is clearly rather battered at the moment, wishing that we had a citizenry more eager to reenact Athenian democracy is precisely the wrong way to restore it to health. Just as people benefit from the division of labor in the provision of goods and services, so, too, do they benefit from an extensively specialized regulatory apparatus far too large for any single person to comprehend. Any ideal of equal participation by all—even only in the process of clear preference formation—seems at odds with people’s revealed choices about how to live their lives; a radically inclusive system is thus a fantasy rather than a solution. A mirror-like idea of representation shuts out the business of legislating. It has no plan to economize on the scarce resources of trust and scrutiny. By banishing meaningful intermediation it actually forecloses on the possibility of constructive politics.⁷⁷

We come to an impasse: the technocrats airily dismiss the legitimacy problem, confident that dissatisfaction is the result of mere misunderstanding of the administrative state, even as evidence mounts showing that citizens have lost faith in their government. If this position seems dangerously complacent, serious and vulgar critics of our contemporary administrative state both overreact. Rather than providing viable reform strategies, they call for a revolution that few people will show up for and that is fundamentally ill-defined in the context of contemporary government. What we need is a set of more incremental prescriptions rooted in our current society’s virtues.

FINDING A MIDDLE WAY

Can we justify government in a way that rejects technocracy’s shortcomings but appropriates its strengths? Can we have meaningful self-government in an age of globalization and fragmented expertise? Can we move toward a system of government in which politics is understood as a constructive force, but not one that will somehow liberate us from the hard work of governing?

⁷⁴ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Row 1942), 243-45. Having a government directly “accountable” to the people runs into similar problems, see Michael W. Dowdle, editor, *Public Accountability: Designs, Dilemmas and Experiences* (New York: Cambridge University Press, 2006), 3-4.

⁷⁵ Steven Bilakovics, *Democracy without Politics* (Cambridge, MA: Harvard University Press, 2012), 19.

⁷⁶ James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (New York: Basic Books, 1990).

⁷⁷ Mark B. Brown, *Science in Democracy: Expertise, Institutions, and Representation* (MIT Press, 2009), chapter 3.

We can, and pursuing such a middle way will not require inventing anything from scratch. Many of the best, if not the most famous, political thinkers of the last century pointed the way by offering a vision of government as the imperfect but necessary vessel for addressing collective problems. This mundane and rather humble conception of government must overcome both the technocratic model, with its promise of correctness, and the populist model, with its promise that the people can somehow triumph if only corrupt intermediating institutions are overcome. If it can do so, we will be in a position to conceive of a far healthier relationship between our administrative state and the other branches, one which would provide a better foundation for legitimacy than our current structure provides.

I do not yet have a fully worked out reform program to offer. Instead, I offer a preliminary sketch of the way forward that offers general principles and sources of inspiration, and then draws out some exemplary components of an institutional reform program. These thoughts are presented in the same spirit I am prescribing for the administrative state: one that emphasizes humility, imperfection, and the need for trial and error.

THE ART OF STATESMANSHIP: COPING, COMPETENCE, AND COMPROMISE

Populists and technocrats share, to a remarkable degree, a mental model of how policymaking ought to happen that was consciously adopted by 19th century civil service reformers. As Herbert Storing described it, this model has two pyramids: in the first, awareness of political problems flows upward from the mass of the people through responsible political parties to leaders at the top, who then settle on the appropriate ends for government. They then pass those goals to the chief administrators at the top of the second pyramid, who faithfully devise ways of realizing those goals and transmit the plans for doing so down through the layers of the bureaucracy.⁷⁸ In the language of economics, the second pyramid solves optimization problems given to it by the first.

The cleanliness and intuitiveness of this two-pyramid model has led to its longstanding dominance, but this is not the model of governance handed down to us by America's founders. In their minds, leaders of all three branches would come from an aristocracy of merit, and they would all compete to direct the energies of the federal government, not necessarily in ways that percolated up from the mass of the citizenry, about whom the founders were deeply ambivalent. The framers were comfortable with the idea that statesmanship would counterbalance potential excesses of the demos.

What should this statesmanship look like today, and how should it affect our thinking about the administrative state? Following Storing, it must elevate "nonpopulist, nonscientific concerns" to the level of respectability.⁷⁹ We must acknowledge the unreality of the two pyramid model: for many important matters, the first pyramid is nothing but thin air, and occupants at all levels of the second pyramid make significant contributions to understanding the nature of problems worth solving.⁸⁰ The process of discovering worthwhile ends amenable to being pursued with

⁷⁸ Herbert Storing, "Political Parties and the Bureaucracy," in *Toward a More Perfect Union: Writings of Herbert Storing*, Joseph Bessette, ed. (Washington, DC: AEI Press, 1995) (<http://www.citizenship-aei.org/wp-content/uploads/15.-Political-Parties-and-the-Bureaucracy.pdf>), 313.

⁷⁹ Herbert J. Storing, "American Statesmanship: Old and New," in Robert A. Goldwin, ed., *Bureaucrats, Policy Analysts, Statesmen: Who Leads?* (Washington, DC: American Enterprise Institution, 1980): 89.

⁸⁰ On the first point, see Schumpeter, *Capitalism, Socialism and Democracy*, 269.

the tools actually available to government is messy and irregular, irreducible to a clean formula. Statesmen must navigate these murky waters.⁸¹

Politics in this vision is not a perpetually failing search for truth, but an attempt to cope as best we can together. This may seem almost painfully humble to those with grand visions of social transformation, but we ought to understand it as ennobling. As Daniel Patrick Moynihan put it,

Those I have respected most and most tried to emulate have not tried to think immensely far ahead, but only a little way ahead: their art is not that of prophesying, but of coping. ... There is nothing grand about any of this, yet there are worse things than commonplace competence addressed to near-term issues, concentrating on what is likely to happen in two and three and five and ten years' time. As one learns more of the world, one comes to value any 'measure of success.'⁸²

The notion of competence here is crucial: government performance can only be judged adequate or successful relative to concrete purposes.⁸³ Although people may have profound ideological disagreements with each other, they may yet be able to agree on the worthiness of achieving certain ends and the adequacy of existing efforts to secure them.

What we need, then, is a system capable of identifying problems in the real world (including those caused by government policy), learning about them, and responding to them incrementally.

Statesmanship, then, must be focused on discerning ends that can act as seeds of fruitful cooperation, which will mean focusing on politically viable compromises.⁸⁴ For technocrats, such "political" matters appear to be a distraction from the real work at hand. This is understandable in our current political climate, in which administrators are asked to pursue ends that at least one political party declares illegitimate. From the agency's standpoint, the best that "politics" can produce in such a world is benign neglect. But at its best, politics must be something more;

as Michael Oakeshott put it, "a conversation, not an argument."⁸⁵

INTERMEDIATION AND INCREMENTALISM

What we need, then, is a system capable of identifying problems in the real world (including those caused by government policy), learning about them, and responding to them incrementally. At first blush, technocracy seems to answer well to this description: what we seem to need is people who can be objective and solve problems. But figuring out which problems deserve our attention is a meta-problem shot through with value judgments, and the notion of apolitical, disinterested learning in the service of the public good is deeply problematic. Technocrats may think that they can do this work, but their fellow citizens do not trust them to do so.

⁸¹ See the discussions of piloting ships in James C. Scott, *Seeing Like a State* (New Haven: Yale University Press, 1998), 316. Scott emphasizes the need for metis, a practical intelligence that resists formulation into universal rules, in directing the ship of state just as much as actual physical vessels.

⁸² Daniel Patrick Moynihan, *Coping: Essays on the Practice of Government* (New York: Random House, 1973), 4.

⁸³ Or, as Scott has it, "The litmus test for metis is practical success." *Seeing Like a State*, 323.

⁸⁴ See Jonathan Rauch, "Rescuing Compromise," *National Affairs* 17 (Fall 2013) (<http://www.nationalaffairs.com/publications/detail/rescuing-compromise>).

⁸⁵ Michael Oakeshott, "Political Education," in *Rationalism and Politics and Other Essays* (Indianapolis, IN: Liberty Fund, 1991), 58.

The temptation, at this point, is to imagine that citizens and their representatives can somehow come together and transcend their disparate interests and clashing ideologies in the name of the common good, such that the products of our politics come to seem wholesome to everyone who appreciates our system. This is the fantasy of disintermediation again: the idea that process can be so virtuous as to deliver an uncontroversial public good. But neither citizens nor legislators can be expected to engage in disinterested politics, let alone see those who disagree with them as doing so. Talking things out will not bridge huge gaps in worldviews; the public interest will remain contestable and contested.

What we can realistically hope to do is create space for legitimate clashes of interests and ideas that result in mutually accepted compromises. Interests will not be transcended or left behind, but they will be made to compete with each other, with the resulting clashes producing workable and useful policies, at least on average. The mechanism by which this can work is simple enough: people who are willing to learn from their fellows may sometimes do so, “and part as wiser men.” We do not seek “perfect consensus of opinion,” only “the mutual fertilization of opinions, and the consequent growth of ideas.”⁸⁶ As Albert Hirschman explained, the idea that the interplay of relatively predictable interests (capaciously defined) can beneficially displace a more implacable conflict of passions has a venerable tradition in the modern study of political economy.⁸⁷

What is called for is mediation in some form that allows citizens to feel that their interests are capably represented and treated as worthy of serious concern before decisions are made. Several institutions offer themselves as potential intermediaries. The executive itself offers to reach citizens through modern marvels such as e-rulemaking, but we have seen that the connection on offer there is generally too stylized and formal to suffice. Political parties were the preeminent intermediaries for much of American history, connecting politicians to citizens in ways that mutually benefited both, and perhaps they should be revitalized, especially at the state and local levels.⁸⁸ But they are organizationally in tatters, and must struggle against the strong association that has grown up in recent years between partisanship and intense ideology.

Legislatures have the most potential to be the intermediaries we need in the modern age. Ideally, they offer arenas in which issues are contested openly by trusted representatives who bring to bear their constituents’ interests and values as the context demands rather than seeking to mirror their thinking. In such a situation, they are very well suited to the work of muddling through, assembling shifting coalitions of the willing to identify problems as they become pressing and adopt incremental changes as they prove needed.⁸⁹ If the public trusts their legislators, the products of their compromises will be accepted as legitimate with minimal hassle.

We obviously do not live in such a trusting world, however; indeed, the causes behind the lack of trust in the administrative state (which render this whole paper necessary) apply with nearly equal force to Congress, whose efforts are generally opaque to most citizens. There are some reasons to hope, though, that legislators are in a better position than those in the executive branch to render the complex processes of government legible and thus act as successful intermediaries even in a low trust environment. First, in spite of their membership on subject-specific

⁸⁶ Karl Popper, *Conjectures and Refutations*, 3rd ed. (New York: Routledge Classics, 2002), 474

⁸⁷ Albert Hirschman, *The Passions and the Interests* (Princeton University Press, 1977).

⁸⁸ Raymond J. La Raja and Jonathan Rauch, “The state of state parties—and how strengthening them can improve our politics,” Brookings Center for Effective Public Management (March 2016) (<http://www.brookings.edu/~media/research/files/papers/2016/03/08-state-parties-la-raja-rauch/states.pdf>).

⁸⁹ Charles Lindblom, “The Science of ‘Muddling Through,’” *Public Administration Review* 19 (Spring 1959): 79-88. Though Lindblom’s interest was in administrators themselves, his notion of conceptualizing problems applies just as well to the work of legislators.

committees, legislators are by and large generalists who must frequently grapple with their own lack of specialized knowledge out in the open, making their efforts easier for lay citizens to evaluate. Second, and related, the legislature is smaller than the vast executive branch, making it inherently more scrutable. Third, legislators are not themselves part of “the government” in their own eyes or those of their constituents. Whereas executive branch actors who are asked to understand the defects of existing policy lose some credibility because they are (or at least seem to be) acting as a judge in their own case, legislators’ membership in an independent and coequal branch of government offers some sense of distance.

Fourth, and of course most important, is that legislators must win election by their constituents. One need not romanticize this requirement, believing that it somehow ensures legislators will be men of the people who have deep roots in their communities. If that is true, it will certainly be a great help in establishing their trustworthiness in the eyes of their constituents. But even if legislators are basically part of the same elite as the denizens of the executive, the fact that they must visibly hustle to impress their voters means that their actions should be geared toward legitimation. To use Joseph Schumpeter’s metaphor: just as producers’ profit motive leads them to produce consumer surplus, so should politicians’ reelection motive lead them to produce acceptable legislation.⁹⁰ For reasons analogous to the economic case, this competitive process should be positive sum, in contrast to a pitched battle between competing ideologies. Or at least, that is the theory. In practice, noncompetitive general election contests may be a major concern.⁹¹

It may seem strange to feature a lament about the demise of Congress in a paper exploring the legitimacy crisis of the administrative state—after all, they seem quite institutionally distinct, and each has enough of its own problems. As I explore in the next section, there may well be worthwhile procedural changes that do not require direct congressional involvement that would shore up administrators’ legitimacy. But it ought to be clear that the administrative state’s legitimacy problems are directly related to the Congress’s increasing willingness to distance itself from the executive branch’s output, reserving for itself the role of infuriated critic and abdicating the role of incremental legislator. This leaves the executive branch too free to go its own way in terms of crafting the substance of policy, and this lack of constraint is often lamented. But it also leaves the executive cut off from its best potential source of legitimacy. Congress today is not the intermediary we need, but it remains crucial to the task of legitimation.

INSTITUTIONAL REFORMS

Supposing one finds the orientation toward government laid out in the preceding section appealing, what is to be done? Surely an attitude change is insufficient to effect meaningful change, and so (in the great tradition of such things) we turn to the question of how this middle way might get some Madisonian teeth. The following mélange of policy prescriptions is perhaps responsive to this challenge, though I offer no guarantees that it represents a definitive answer.

⁹⁰ Schumpeter, *Capitalism, Socialism and Democracy*, 284.

⁹¹ See Lee Drutman, “Political Dynamism: A New Approach to Making Government Work Again,” New America Foundation (February 2016) (https://static.newamerica.org/attachments/12404-political-dynamism-2/political_dynamism.c416ce23ca23482b8da8f0feaf14dbb3.pdf): 17-25.

LOCALISM WHEN POSSIBLE

The first recommendation is an old one, freighted with a great deal of historical baggage but nevertheless worth picking up: devolving policymaking to the most local level that is compatible with reasonably achieving policy goals. Localism is appealing because concreteness is most easily achieved in local settings, allowing realistic expectations to form about government capacity and pushing policymakers to focus their attention on manifestly useful projects.

Compared with national (or even international) technocrats, fragmented elites organically rooted in local communities are able to provide leadership that is more meaningfully legible and accountable to their fellow-citizens. When people can see that the problems their leaders address are real, and that their solutions stem from experiences with particulars rather than the imposition of some ideology, they are far more likely to accept choices as legitimate, even when they are coercive.⁹² This is the deep value of having people believe in self-government.

Especially where broader social trust is in short supply, which it often will be for national-level policies, it sometimes makes sense to design social institutions to produce feelings of meaningful accountability to citizens rather than trying to optimize on program effectiveness with accountability layered on as an afterthought.⁹³

The administrative state is likely to be able to legitimate itself most successfully where it can directly deploy these techniques in its own work, such as through decentralized community engagement. “Cooperative federalism,” for all its potential to detract from legitimacy if it obscures lines of responsibility, does indeed hold real promise as a way of allowing federal policies to draw on the legitimacy of local elites.

The administrative state must therefore do a better job of seeking to justify itself to those who are skeptical that it has fairly weighed all perspectives.

GREATER ADMINISTRATIVE STATE ATTENTION TO JUSTIFICATION

For many policy areas, however, devolution is a poor match for the nature of the issues being addressed. National-level problems, and especially those that are more remote from people’s everyday experiences, may well need national-level solutions. In such cases, the federal government must nevertheless strive to create a sense that the experts are working in the public’s service, and not just in the sense of efficiently delivering services to them. Agencies should be acutely aware of the danger that they will become (or be perceived as) insular and uninterested in the concerns of the public—that their work will seem totally divorced from any notion of self-government.

The administrative state must therefore do a better job of seeking to justify itself to those who are skeptical that it has fairly weighed all perspectives. Administrative state insiders should have no illusion that they can neutrally mix together the ingredients of our society’s disparate views, cook with deliberation, and take from the stovetop an obviously correct pudding. The proof of the pudding is in the eating, and most national policy areas never give people a taste for themselves; they must decide whether the results are legitimate based in large part on whether

⁹² Moynihan, *Coping*, 23.

⁹³ Jerry Mashaw, “Accountability and Institutional Design: Some Thoughts on the Grammar of Governance,” 156, in Dowdle, editor, *Public Accountability*.

they trust the participants and the processes that produced the rule. Simply knowing that all reasonable arguments were formally represented in discussion, as in rulemaking, is insufficient.⁹⁴

Agencies must also do a much better job at explaining themselves to interested lay citizens.

At the elite level, this should lead agencies to seek out their own critics and confront them directly, and not just on the agency's own turf. That is, agencies should give the sense that they are eager to understand why outsider experts find their policies lacking, and when they learn things from these encounters they should actually respond with policy changes. Such course corrections happen now only in

the most haphazard way, mostly when political pressure or an adverse court judgment can be brought to bear. But there is no reason that agencies need to take such a defensive posture as a default.⁹⁵

Agencies must also do a much better job at explaining themselves to interested lay citizens. At the bare minimum, this should mean presenting concise, plainly written explanations for how the agency came to exercise its current functions, what those functions are, and how the agency ensures that what it does is effective. While many agencies do a decent job of the second of these, and a few adequately do the first, very few agencies address the third question of quality control in any accessible way, beyond some perfunctory declaration that anti-fraud processes are in place.⁹⁶ Ideally, agencies should do a good deal more to explain themselves to citizens: they should openly acknowledge which parts of their work are politically controversial and explain how and why they reject criticisms. To the extent this function takes place at all today, it happens in final rules' "Response to Comment" sections that are the opposite of accessible for interested citizens, even educated and informed ones, or in court filings that are actually unavailable to anyone unacquainted with the (paywalled) wonders of PACER. There is no reason for this reticence, and indeed it reinforces the image of federal agencies as oblivious to concerns about their work. Laws requiring agencies to explain themselves better couldn't hurt.

The discipline of having to fashion policies capable of being convincingly explained to citizens should push administrators toward a concern for the coherence of their programs—rhetorical, but also substantive. There is clearly a limit to this principle: extensive engagement with critics who refuse to learn or accept basic facts may well be a waste of resources. But it is entirely healthy that government administrators should feel obliged to seriously, repeatedly, and deferentially engage with outside experts under the assumption, always correct, that they have much to learn. In other words, the administrative state must not only be formally open to the input of outsiders, it must actively and substantively seek to educate itself through encountering concrete expertise wherever it occurs. Technocracy, too

⁹⁴ The same objection applies to John S. Dryzek and Simon Niemeyer, "Discursive Representation," *American Political Science Review* 102 (2008): 481-493.

Defenders of our current arrangements would undoubtedly argue that notice and comment rulemaking already give adequate access to those wishing to engage with agency policymakers. But the context of this interaction almost necessitates that agency officials react defensively: they must hold their proposal out as already complete and unbiased, which makes it hard to understand why they should listen to those who are pleading their cases. If they do make changes, they are immediately opened to charges of capture. Why would they listen to the very people they are supposed to effectively and neutrally oversee?

⁹⁵ Note that in many ways, approaching experts with skepticism "values thought, intellect, or analysis more than does" simply empowering them. "It recognizes that analysis is difficult, in short supply, and of an inadequate level of competence. Although that undercuts a faith that men can solve social problems by the intellectual design of institutions and policies, it also leads people to prize highly what capacities for analysis society possesses, like a person in a desert who prizes the shade of any single tree he finds." Charles E. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (New York: Basic Books, 1977), 259-60.

⁹⁶ For example, the Federal Reserve System publishes a "Purposes & Functions" booklet, which is admirably clear if not terribly concise (https://www.federalreserve.gov/pf/pdf/pf_complete.pdf). But it is rarely updated, and you could learn nothing at all from it about how the Fed seeks to learn from its own failures or critics. Strikingly, the Fed also has a sidebar on its home page saying: "Does the Fed get audited? YES. Learn more."

often impressed with its own stockpile of information, must humble itself and self-consciously struggle for elusive understanding.

EXPOSING AGENCIES TO BETTER, MORE RELIABLE SCRUTINY

We may reasonably suppose that sharper elbows are needed to force the issue of agency scrutiny, however, and so we should consider reforms to strengthen more adversarial processes. One such option is to beef up Office of Inspector General (OIG) positions that internally investigate agency choices, which are often underfunded. To be truly effective, these must go beyond high level anti-abuse monitoring to include scrutinizing the thought processes central to agency policymaking. OIGs must also have the ability to overcome the resistance of top-level agency leaders. Political appointees at the top of agencies vary greatly in their tendency to stonewall their own OIGs, predictably hindering their effectiveness. One response to this is to hope that OIGs' investigations can be turned nonpolitical.⁹⁷ But one might alternatively make it harder to resist their inquiries. To the extent we conceptualize OIGs as agents of the public charged with definitively establishing the presence or absence of good government hygiene, they begin to look like crucial producers of legitimacy whose work is of the utmost importance, even if they strike top agency officials as distractions from programmatic goals.

It is also worth considering whether more disruptive reorganizations to internal agency cultures could be warranted in the name of ensuring effective scrutiny. Compared to large public corporations, the documentation, monitoring, and governance requirements for government agencies are quite minimal. Firms have compliance departments distinct from their legal counsel, and perhaps agencies should as well. And the management at public firms must answer to a board of directors made up of veteran outsiders capable of asking hard questions and empowered to use significant company resources to get answers. Although we might like to imagine that the Executive Office of the President or OIRA might provide a similar sort of scrutiny for executive branch agencies, perhaps it is worth considering whether developing permanent bodies of dedicated outside "directors" would be fruitful.

Coming from a different direction, agencies should also be required to design their policies to make them more easily evaluated, both by the agency itself and by outsiders. The Obama administration deserves some real credit on this front, as it has tried to make evidentiary rigor a central part of some social policies.⁹⁸ Across the administrative state, there are many efforts to make agencies more deliberate about their attention to evidence. But this should be a clearer requirement, probably subject to formal procedural requirements, rather than a disconnected series of ad hoc choices. Policies should facilitate their own retrospective reviews, such that agencies solicit new information, understand its importance, and transparently make incremental adjustments accordingly.

BUILDING CONGRESSIONAL CAPACITY

One might wonder if such regularization of incremental adjustments is enough, however. Arguably, decades-old regulatory policies deserve to be unearthed and examined in their entirety, not just by the agencies themselves but by legislators. This is the rationale behind the perennial reform favorite of sunset laws, which require renewed congressional attention to a policy area to keep its underlying statutes in place.

⁹⁷ John Hudak and Grace Wallack, "Political appointees as barriers to government efficiency and effectiveness," Center for Effective Public Management at Brookings (April 11, 2016) (<http://www.brookings.edu/research/papers/2016/04/11-political-appointees-barriers-government-efficiency-effectiveness>).

⁹⁸ Ron Haskins and Greg Margolis, *Show Me the Evidence: Obama's Fight for Rigor and Results in Social Policy* (Brookings Institution Press, 2014).

The problem with sunset laws is that if Congress lacks the wherewithal to evaluate a policy's shortcomings, it is likely to simply go through the motion of reauthorization without adding much. Or, worse, it may rely so heavily on biased information from lobbyists that the changes it makes are to the detriment of good public policy. In short, without a strong capacity for policy evaluation and the habit of making use of it, Congress will not be a constructive partner—and probably not a particularly effective legitimator, either.

Obviously members of Congress have themselves made the decisions that have led to their institution's decline—perhaps for rational reasons derived from the current electoral climate. And so it is reasonable to ask why they would make use of greater institutional capacity if it existed. But we might, in this instance, follow the example of Ray Kinsella, the protagonist of *Field of Dreams*, who was willing to take a leap of faith and listen to the voice that intoned, “If you build it, they will come.” By offering legislators the ability to better understand policy issues, we just might entice them to use it. This would have the beneficial effect of making our legislature less dependent on lobbyist information, and it is probably a necessary step if the legislature is to match swords with the executive.

Understanding the administrative state's legitimacy crisis is crucial to explain the revolt of 2016.

Here I will not go into specific proposals for building congressional capacity; happily, there is a nascent movement devoted to this task.⁹⁹ It is clear that to be effective, Congress must couple capacity building with internal rule changes, much as it did with the budget process in the 1970s. It must also consider how to make its oversight function more

impactful by reducing the tendency toward empty preening. In short, our constitutional design gives Congress the best position to discipline and legitimate the administrative state. A first branch is a terrible thing to waste.

REASONS FOR PESSIMISM IN THE AGE OF CRUZ, TRUMP, AND SANDERS

Now we are engaged in a great civil war, testing whether American representative democracy uneasily coupled with a powerful technocratic administrative state can long endure. Or at least, as I write, that is how the 2016 presidential election has come to feel. A great many factors contributed to the crack up of our familiar lines of political contestation, and our commentariat suggests more every day. Still, understanding the administrative state's legitimacy crisis is crucial to explain the revolt of 2016.

Three of the four leading candidates have responded to the pathologies of our technocracy with sweeping overreactions of the sort I criticize above. Ted Cruz speaks about the administrative state most directly, declaring, “It's time to return to a federal government that abides by our constitutional framework and strips power from unelected bureaucrats.”¹⁰⁰ He sees himself as channeling public outrage at an out-of-touch, corrupt elite toward a wholesale transformation of government, perhaps rejecting as much as a century of state development as inconsistent with fundamental constitutional norms. Cruz's vision of change is rooted in his own experience as a constitutional lawyer: he seems to think that all that will be necessary to carry through his hugely ambitious reformation of government will be an unwavering faith in the righteousness of this vision joined to an unlimited willingness to adapt an adversarial

⁹⁹ See especially, Lee Drutman and Steven Teles, “A New Agenda for Political Reform,” *Washington Monthly* (March/April/May 2015) (http://www.washingtonmonthly.com/magazine/marchaprilmay_2015/features/a_new_agenda_for_political_ref054226.php); Kevin Kosar, “How to Strengthen Congress,” *National Affairs* 25 (Fall 2015) (<http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>). In future work, Kevin Kosar and I will explore the potential of a Congressional Regulation Office.

¹⁰⁰ Ted Cruz campaign website, “Five For Freedom” (<https://www.tedcruz.org/five-for-freedom/>).

posture rather than settling for half-measures or compromises.¹⁰¹ Cruz judges normal politics incapable of delivering us from the iniquities of our present regime, and, as he has obstreperously demonstrated during his brief career as a senator, he is willing to grind the current apparatus of government to a screeching halt to realize his vision immediately.

Donald Trump offers a very different form of populism, one that may well be reconcilable with an extensive administrative state. Trump's major pitch is that the government we have is staffed with loser elites whose goals sharply diverge from those of ordinary Americans and who are inept to boot. Government as it currently exists is best understood as an imposition by an alien and untrustworthy group; government as it would be under Trump would be a genuine emanation of the people, and a terrific one at that. The real estate mogul turned reality-television star is famously elusive about *what* that government would do, but the *how* is clear enough: he would impose the people's will through the force of his personality, his superior negotiating prowess, and perhaps through more drastic means of intimidation.¹⁰² He is thus holding himself forth as a quintessential plebiscitary leader who will provide a coherent, compelling vision of the nation to be realized regardless of any concerns about mere process. This is a vision less of self-government than of collective transcendence of the ordinary.

Bernie Sanders, social democrat and Scandinavia admirer, obviously brings an entirely different vision of what government should look like, but his desire for revolutionary change in the way we approach policymaking has a great deal in common with some of his Republican counterparts. For Sanders, normal political compromise entails capitulation to a political class that has been corrupted by corporate money, and so the first step in solving any of our problems is to reconstitute our politics along radically more democratic lines. The people, unencumbered by the corrupting layer of politics, will steer the nation toward policies that promote the common good. And, like the progressives of old, Sanders and his supporters are comfortable with the idea that the people will often empower neutral experts to work on their behalf.

What unites these three candidates is their dismissiveness of our current governing arrangements that so prominently feature the administrative state. They have clearly tapped into a deep wellspring of discontent among the citizenry, stunning those who thought that candidates with so little support among party insiders could ever mount serious primary campaigns, and their successes to this point make it difficult to simply shrug off America's legitimacy problems as marginal phenomena. As we reach the end of Barack Obama's presidency, defending the status quo in which expert administrators act as primary policymakers has become thankless work. As this paper makes clear, there is good reason for that.

Denialism and escapism alike lead in ugly directions: we have no choice but to search for a middle way.

But is there any room, in this political season, for the kind of middle way approach sketched out here? There are plenty of reasons to be skeptical. The dearth of trust in our governing class that has been exposed by the insurgent campaigns is profound. Working our way back to a point in which normal Americans can see their federal government as a manifestation of self-government will be difficult. It is far from clear that a program as unspectacular as the middle way offered here can achieve an inclusive sense of "we."

¹⁰¹ For a helpful framing, see Yuval Levin, "Listening to Four Republican Candidates," *National Review* (January 12, 2016) (<http://www.nationalreview.com/article/429604/trump-christie-cruz-rubio-what-they-share-where-they-differ>).

¹⁰² Most suggestively, he said of the Speaker of the House: "Paul Ryan, I don't know him well, but I'm sure I'm going to get along great with him. And if I don't, he's going to have to pay a big price." Quoted in Tory Newmyer, "Donald Trump Threatens House Speaker Paul Ryan," *Fortune* (March 1, 2016) (<http://fortune.com/2016/03/01/donald-trump-threatens-paul-ryan/>).

One can make a strong argument that the fundamental problem is a cultural one, in which haves and have-nots have diverged to the point of being incomprehensible to each other.¹⁰³ If that is right, our society may need stronger medicine than changes to political processes and attitudes. Put another way, old organic solidarities have frayed, and I have argued that ideological solidarity cannot offer an adequate replacement—but it is very hard to prescribe the creation of new organic solidarities.

Those convinced that experts are inherently suspicious may also find it difficult to reconcile themselves to any order in which expertise is valued; perhaps the desire for disintermediation runs so deep that only radical leveling can satisfy. If anyone who gains power and relies on expert advisors is immediately suspected of being captured—and recent political developments strongly suggest this is the case—then the revolution will devour its children and incremental changes will be of little use.

To counter the anti-politics message of Cruz, Trump, and Sanders, we need an electorate able to appreciate the role played by our deliberative processes—both in the legislature and executive branch. Part of the answer is improving those deliberations, which are alternately shoddy or cloistered. But another part requires that people have reasonable expectations about what a modern democracy can be expected to look like. That is a big ask: democratic ideals are widely loved, but democratic practices are perceived as grubby, ineffectual, and ugly.¹⁰⁴ Loving the sausage makers in an age of outrage will not be easy.¹⁰⁵

With all these reasons for pessimism in mind, workable democracy may begin to sound like an oxymoron. Hunkering down along technocratic lines starts to sound appealing. But our current political season should provide a vivid illustration of why that strategy is unlikely to be a good one: an administrative state untethered to a vital politics will always be vulnerable to plebiscitary attacks by outsiders who draw on dangerous wellsprings of emotion. Denialism and escapism alike lead in ugly directions: we have no choice but to search for a middle way.

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103 See Bill Bishop with Robert G. Cushing, *The Big Sort: Why the Clustering of Like-Minded America is Tearing Us Apart* (New York: Houghton Mifflin, 2008); Charles Murray, *Coming Apart* (New York: Crown Forum, 2013).

104 For explorations of Americans' perceptions, see John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy* (New York: Cambridge University Press, 1995), and *Stealth Democracy: Americans' Beliefs about How Government Should Work* (New York: Cambridge University Press, 2002).

105 For an uneven but helpful exploration of this theme, see Martin Gurri, *The Revolt of the Public and the Crisis of Authority in the New Millennium* (Kindle self-published, 2014).

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