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PARTISAN BALANCE WITH BITE

*Brian D. Feinstein**

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Dozens of multimember agencies across the federal government are subject to partisan balance requirements, which mandate that no more than a simple majority of agency members may hail from a single party. Administrative law scholars and political scientists have questioned whether these provisions meaningfully affect the ideological composition of federal agencies. In theory, Presidents can comply with these requirements by appointing ideologically sympathetic members of the opposite party once they have filled their quota of same-party appointees (i.e., a Democratic President can appoint liberal Republicans or a Republican President can appoint conservative Democrats). No multi-agency study in the past 50 years, however, has examined whether—in practice—partisan balance requirements actually prevent Presidents from selecting likeminded individuals for cross-party appointments.

This article fills that gap. We gather data on 578 appointees to 23 agencies over the course of six presidencies and 36 years. We identify the estimated ideological preferences of those appointees based on personal campaign contributions. We then compare the ideological preferences of co-party and cross-party appointees across agencies and across presidencies. Our analysis indicates that partisan balance requirements had at most a modest impact on the ideological composition of multimember agencies from the late 1970s to the early 1990s, but a stronger effect from the mid-1990s onward. We then consider several possible explanations for these findings. Our results are consistent with a story of “partisan sort”: as ideology and party affiliation have become more tightly linked, cross-party appointees have become more likely to share the ideological preferences of their co-partisans rather than those of the appointing President. Our findings suggest that the

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increasing polarization of political parties is contributing to a concomitant increase in the ideological heterogeneity of multimember agencies subject to partisan balance mandates.

INTRODUCTION

Partisan balance requirements are a common—and controversial—feature of federal agency design. These provisions generally mandate that only a bare majority of commissioners of a multimember agency can hail from the same political party. More than half of all multimember agencies within the federal government are now subject to these party balance rules, ranging from little-known entities like the African Development Foundation to high-profile agencies such as the Federal Communications Commission and the Securities and Exchange Commission.¹ Yet despite the prevalence of partisan balance requirements, scholars of administrative law lack even a basic understanding of how these mandates affect the ideological composition and policy outputs of multimember agencies. This article sheds light on partisan balance requirements and their consequences.

A number of commentators have expressed doubt as to whether partisan balance requirements (PBRs) materially affect the ideological composition of multimember agencies. They point out that Presidents can comply with the letter of the law simply by selecting an appointee who is nominally registered as a member of the opposite party or as an independent, even if that individual is otherwise the President's ideological ally. This view was perhaps most clearly stated in a 1976 report commissioned by the Senate Commerce Committee, which averred that neither Republican nor Democrat Presidents had chosen “‘bona fide, honest-to-God’ members of the other party” to fill cross-party seats.²

Until we can determine empirically whether PBRs meaningfully constrain a President's ability to appoint ideologically sympathetic commissioners to multimember agencies, it is difficult to say much about the positive or normative implications of these statutory requirements. And yet in the last half century, not a single academic article has systematically examined whether and how PBRs affect the ideological composition of the agencies to which they apply. One study has sought to measure the effect of partisan balance on voting patterns at the Federal Communications Commission (FCC) specifically,³ and a handful of scholars have offered anecdotal observations that speak to this question.⁴ But for the last systematic, cross-agency empirical analysis of the effect of PBRs on the ideological

¹ See Kirti Datla & Richard L. Revesz, *Deconstructing Independent (and Executive) Agencies*, 98 *Cornell L. Rev.* 769, 797 *tbl.4* (2013).

² James M. Graham & Victor H. Kramer, *Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission, 1949-1974*, at 386 (Comm. Print. 1976) (prepared for the S. Comm. on Commerce, 94th Cong.).

³ Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* (Feb. 12, 2007) (unpublished manuscript), <http://dho.stanford.edu/research/partisan.pdf>; *see also* Wenmouth Williams, Jr., *Impact of Commissioner Background on FCC Decisions: 1962-1975*, 20 *J. Broad.* 239, 241 (1976) (providing an earlier look at FCC voting patterns).

⁴ See *infra* notes 54-58 and accompanying text.

composition of agencies, we have to look all the way back to a 1964 study by political scientists Stuart Nagel and Martin Lubin.⁵

A lot has changed since 1964. Back then, both major political parties were ideological “big tents”: the Democratic Party included a staunchly conservative Southern base, which found itself to the right of “Rockefeller Republicans” from the North on several major issues.⁶ By the turn of the 21st century, however, partisan identity had become a much more reliable predictor of ideology—a phenomenon known as “partisan sort.”⁷ Meanwhile, developments in campaign finance law, information technology, and empirical social science have made individual ideology much easier to observe. The Federal Election Campaign Act of 1971 for the first time required candidates and political parties to disclose the identities of their contributors as well as the amounts donated.⁸ Those records have been open to the public in a computer-searchable form since 1980,⁹ and have been posted on the Internet in a searchable format since 1998.¹⁰ While an individual’s campaign contributions are not a perfect proxy for ideology, recent political science research suggests that donations closely track ideological preferences.¹¹ By leveraging information on campaign contributions made by individuals across several election cycles, researchers can distinguish among liberals, moderates, and conservatives within the same political party—both inside and out of government—in a much more reliable way than past generations of scholars possibly could.

All this means that we are long overdue for a comprehensive, cross-agency empirical analysis of the effect of PBRs on the ideological composition of multimember boards and commissions. This article fills that void. Before delving

⁵ Stuart Nagel & Martin Lubin, *Regulatory Commissioners and Party Politics*, 17 *Admin. L. Rev.* 39 (1964).

⁶ See Eric Schickler, Kathryn Pearson, & Brian D. Feinstein, *Congressional Parties and Civil Rights Politics from 1933 to 1972*, 72 *J. Pol.* 672 (2010) (describing how northern Democrats took the lead on advancing civil rights legislation beginning in the 1940s, with Republicans in the middle – offering tepid support and occasional behind-the-scenes opposition – and with southern Democrats firmly opposed); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *Stud. Am. Pol. Dev.* 1 (2005) (describing a similar dynamic regarding labor issues).

⁷ See Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (2009) (defining the term “partisan sort”).

⁸ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 14-15, 17, §§ 304, 308(a)(4).

⁹ Telephone Interview with Senior Public Affairs Specialist, Public Records Branch, Federal Election Commission (May 30, 2017); accord 49 Fed. Reg. 22335-01 (May 29, 1984) (setting fees for Freedom of Information Act requests concerning “computer search[es] of an entire individual contributor file for contributions made by a particular individual or individuals”).

¹⁰ Press Release, Federal Election Commission, *FEC Launches New Web Info*, July 21, 1998, available at <http://classic.fec.gov/press/press1998/websrch.htm> (last visited June 20, 2017). The FEC first made available online “comprehensive computer files containing campaign finance information” in 1996 and introduced a search function two years later. *Id.*

¹¹ See Adam Bonica, *Mapping the Ideological Marketplace*, 58 *Am. J. Pol. Sci.* 367 (2014).

into the analysis, we consider two explanations as to why limitations on the *partisan* composition of agencies might affect the *ideological* composition of multimember agencies: a *supply-side theory* and a *demand-side theory*. (We also consider alternative theories that focus on search costs and identity signaling.) The supply-side theory posits that there is only a small pool of liberal Republicans and conservative Democrats who are potentially qualified to serve as commissioners, and so Presidents looking for competent cross-party appointees whose ideological preferences track their own will often find themselves out of luck. Thus, Presidents who are required by PBRs to make cross-party appointments to multimember agencies will be compelled by supply-side constraints to choose a genuine cross-partisan. Whereas the supply-side theory focuses on the first stage of the appointment process (the selection of a nominee), the demand-side theory focuses on the end stage: confirmation. The demand-side theory emphasizes that nominees to federal agencies ultimately must be “sold” to the Senate, since a majority vote of the Senate is necessary for confirmation. On this view, consumers in the confirmation market (i.e., senators) demand cross-party appointees who are bona fide members of that party, and thus force the President to choose commissioners from the other side of the ideological spectrum.

The supply-side and demand-side theories both suggest that PBRs will affect the ideological composition of multimember agencies, but they generate different predictions as to when and why. If the supply-side theory is correct, then we would expect to see the effect of PBRs growing over time in tandem with partisan sort. If the demand-side theory is correct, then we would expect to see the effect of PBRs most strongly in periods of divided government, when the opposition party in the Senate has leverage to force the President’s hand.

To assess the effect of PBRs and test these and other theories, we gather data on the identities of 578 appointees to twenty-three agencies over the course of six presidencies and thirty-six years (1979 through 2014). We then use data on those individuals’ campaign contributions to estimate their ideological preferences. We compare the (estimated) ideological preferences of appointees to those of their appointing Presidents, and we compare co-party appointees (i.e., a Democrat appointed by a Democratic President or a Republican appointed by a Republican President) to cross-party appointees (i.e., a Republican appointed by a Democratic President or vice-versa). We show how the effects of PBRs on the ideological composition of federal agencies vary over time and with changes in control of Congress.

Our main findings are as follows. *First*, we find that partisan balance requirements do “bite.” When Presidents are required by law to make cross-party appointments, they generally choose “bona fide, honest-to-God” members of the opposite party—or, at least, individuals whose observed ideologies are significantly different than the President’s own. Looking at the 36-year period overall, Republican Presidents appoint Democrats who are more liberal than themselves and more liberal

than their Republican co-party appointees. Likewise, Democratic Presidents appoint Republicans who are more conservative than themselves and than their Democratic co-party appointees.

Second, the effect of PBRs on the ideological composition of multimember agencies is much more pronounced today than it was at the beginning of our study period. This finding is consistent with the supply-side theory and our expectations based on partisan sort. President Jimmy Carter often named relatively moderate Republicans as cross-party appointees; Presidents Ronald Reagan and George H.W. Bush often appointed centrist or conservative Democrats. By the time of President Bill Clinton, however, this phenomenon had subsided. Republicans appointed by Presidents Clinton and Barack Obama tended to be quite conservative, and Democrats appointed by President George W. Bush tended to be quite liberal.

Third, we find no apparent relationship between the presence or absence of divided government and the ideological distance between the President and cross-party appointees. This finding is at odds with the demand-side theory, which would lead us to expect the effect to be most pronounced when the White House and the Senate are controlled by different parties. While we do not dismiss the demand-side explanation entirely, our analysis suggests that supply-side factors do more to mediate the effect of PBRs on the ideological composition of multimember agencies.

We conclude by considering the implications of our empirical analysis for the scholarly understanding of PBRs. We identify three main accounts of partisan balance requirements in the administrative law literature. One account, which pulls insights from political science, posits that PBRs reduce the costs borne by Congress in monitoring agency actions (the *monitoring account*). On this view, PBRs ensure that agencies include members whose policy preferences diverge from the sitting President's, and these minority members will alert lawmakers if members from the President's party stray from legislators' preferences.¹² A second account, drawing on the social psychology literature, suggests that PBRs can improve agencies' deliberative processes by offsetting tendencies toward group polarization (the *deliberative account*).¹³ According to this view, PBRs ensure that multimember agencies include a diverse set of perspectives, thereby counterbalancing tendencies toward group polarization. Apart from any effect on the cost of congressional monitoring, this account suggests that PBRs can improve federal administration by raising the quality of agency decisionmaking.¹⁴ A third account, rooted in constitutional law scholarship on the "unitary executive," posits that PBRs obstruct the President in the execution of her constitutional responsibilities (the *obstruction*

¹² See *infra* Subsection I.B.1.

¹³ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 74 (2000) (defining group polarization as involving "members of a deliberating group predictably mov[ing] toward a more extreme point in the direction indicated by the members' predeliberation tendencies").

¹⁴ See *infra* Subsection I.B.2.

account).¹⁵ According to this view, PBRs “quite literally force Presidents to rely on their political enemies to carry out their executive duties,”¹⁶ and thus potentially prevent Presidents from implementing their policy agendas.¹⁷

These three accounts are not mutually exclusive: in theory, PBRs could reduce the cost to Congress of monitoring multimember agencies, counterbalance tendencies toward group polarization within agencies, *and* force Presidents to rely on their political enemies. Moreover, these three perspectives on PBRs all rest on the same empirical premise: that PBRs actually operate as meaningful constraints on the President’s ability to appoint commissioners who share her ideology and policy preferences. Our findings shore up that empirical premise, though they fall short of confirming the more ambitious claims that each account makes. Our analysis also indicates that the effects of PBRs on the operation of multimember agencies are potentially quite different today than they were three decades ago, when PBRs had a less dramatic effect on ideological composition. This finding suggests that conclusions regarding PBRs drawn from the period before partisan sort should be reassessed anew. Finally, and perhaps counterintuitively, we suggest that for those who are concerned about presidential control over multimember agencies, the fact that PBRs are relatively effective actually makes them less threatening to the sitting President. We explain our rationale for this counterintuitive conclusion at greater length below.¹⁸

For the optimist, our results might suggest that there is an unexpected upside to partisan sort: as the parties become less ideologically diverse, multimember agencies become more so. While the phenomenon of partisan sort has fueled concerns about group polarization in government institutions,¹⁹ our results suggest that the combination of partisan sort and partisan balance requirements improves the prospects for ideological diversity within multimember agencies. We caution, though, that sweeping normative conclusions are premature: our study addresses the effect of PBRs on the ideological diversity of multimember agencies, not the effect of ideological diversity on agency functioning. We cannot yet claim that PBRs are

¹⁵ Ronald J. Krotoszynski, Jr., Johnjerica Hodge, and Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 *Notre Dame L. Rev.* 941 (2015).

¹⁶ *Id.* at 991.

¹⁷ *Id.* at 995.

¹⁸ In brief, PBRs ensure that Presidents inherit commissions with only a bare majority of members from the opposition party. For a commission with fixed terms for appointees and a PBR, this means that in expectation, it will take less time for a new President to “flip” the commission to include a majority of her party’s members than it would for an otherwise identical multimember commission with a fixed-term provision and no PBR.

¹⁹ See David A. Jones, *The Polarizing Effect of a Partisan Workplace*, 46 *PS: Pol. Sci. & Pol.* 67 (2013) (reporting evidence of group polarization at federal and other inside-the-Beltway workplaces); see also James B. Stewart, *Case Study in Chaos: How Management Experts Grade a Trump White House*, *N.Y. Times* (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/business/donald-trump-management-style.html> (reporting management expert’s concerns regarding “group think” in Trump administration).

desirable because ideologically diverse agencies function better than agencies with monolithic memberships. What we can say is that for such a claim to be true, it must first be true that PBRs actually lead to more ideologically diverse agencies, and our results strongly affirm that first premise.

While our study is primarily backward-looking, our findings have clear implications going forward for the evaluation of cross-party appointments under President Trump and subsequent administrations. Without knowing whether past Presidents have named genuine cross-partisans to PBR agencies, it is difficult to determine whether a new White House occupant is acting consistent with established norms. So far, President Trump has been slow to fill vacancies on PBR agencies—though especially slow to make cross-party nominations. As of this writing, President Trump had nominated thirty-one individuals to positions on the twenty-three boards and commissions with statutory or informal PBRs that we consider here,²⁰ only five of whom were cross-party appointments. Notably, the five Democrats nominated by President Trump to cross-party seats on PBR agencies all have strong Democratic credentials.²¹ At the same time, a President potentially can

²⁰ See Tracking How Many Key Positions Trump Has Filled So Far, Wash. Post, <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database> (last visited Sept. 11, 2017).

²¹ Jessica Rosenworcel, a Trump appointee to the FCC, is a former Senate Democratic staffer who was appointed by President Obama to a Democratic seat on the commission and contributed \$2,700 to Hillary Clinton during the 2016 campaign. See Biography of Former Commissioner Jessica Rosenworcel, Fed. Comm'ns Comm'n, <https://www.fcc.gov/biography-former-commissioner-jessica-rosenworcel> (last updated Jan. 4, 2017); Donor Lookup, OpenSecrets.org, <https://www.opensecrets.org/donor-lookup/results?name=Jessica+Rosenworcel> (last visited July 10, 2017) (search results for “Jessica Rosenworcel”). Jason Kearns, a Trump appointee to be chairman of the U.S. International Trade Commission, is a former House Democratic staffer who donated \$1,000 to Hillary Clinton’s 2016 presidential bid and who was previously nominated by President Obama to that post. See Press Release, Ways & Means Comm. Democrats, U.S. House of Representatives, Neal, Levin Statements on Nomination of Jason Kearns for International Trade Commission (Jan. 18, 2017), <https://democrats-waysandmeans.house.gov/media-center/press-releases/neal-levin-statements-nomination-jason-kearns-international-trade>; Donor Lookup, OpenSecrets.org, <https://www.opensecrets.org/donor-lookup/results?name=Jason+Kearns> (last visited July 10, 2017) (search results for “Jason Kearns”). Rostin Behnam, a Trump appointee to the Commodity Futures Trading Commission, was an aide to Democratic Senator Debbie Stabenow of Michigan and donated a total of \$5,150 to Hillary Clinton during the primary and general election campaigns. See Gabriel T. Rubin & Andrew Ackerman, White House to Nominate Russ Behnam as CFTC Commissioner, Wall St. J. (July 12, 2017), <https://www.wsj.com/articles/white-house-to-nominate-russ-behnam-as-cftc-commissioner-1499889964>; Donor Lookup, OpenSecrets.org, <https://www.opensecrets.org/donor-lookup/results?name=rostin+behnam> (last visited July 16, 2017) (search results for “Rostin Behnam”). Richard Glick, a Trump nominee to the Federal Energy Regulatory Commission, is a Democratic Senate aide with a long record of donations to Democratic candidates. See Robert Walton, Trump To Nominate Democratic Senate Aid Richard Glick to FERC, Utility Dive (June 29, 2017), <http://www.utilitydive.com/news/trump-to-nominate-democratic-senate-aide-richard-glick-to-ferc/446151>; Donor Lookup, OpenSecrets.org, <https://www.opensecrets.org/donor-lookup/results?name=richard+glick> (last visited Aug. 10, 2017) (search results for “Richard Glick”).

skew the composition of PBR agencies by quickly making co-party appointments while stalling on cross-party nominations.²² It is premature to say whether the Trump administration is pursuing such a strategy. What we can say is that by documenting past practices regarding appointments to PBR agencies, our study establishes a baseline that can facilitate future comparative evaluations.

Our article proceeds in three parts. Part I provides background on PBRs, reviews the existing literature on these requirements, and considers causal pathways by which these requirements might affect the ideological composition of multimember agencies. Part II describes our data and methodology and presents our main empirical results. Part III discusses the implications of our results and identifies areas for future research.

I. PARTISAN BALANCE REQUIREMENTS: HISTORY, THEORY, AND EXISTING EVIDENCE

This first Part provides an overview of partisan balance requirements in agency organic statutes and considers reasons why these requirements might (or might not) affect the ideological makeup of boards and commissions. Section I.A briefly summarizes the history of partisan balance requirements. Section I.B surveys the literature on the efficacy of partisan balance requirements. Section I.C considers causal pathways through which PBRs might operate and explains how these different causal stories can be disentangled.

A. *A Short History of Partisan Balance Requirements*

Partisan balance requirements for federal agencies date at least as far back as the Edmunds Anti-Polygamy Act of 1882.²³ The Act prohibited polygamists from voting or running in Utah elections. A new Utah Commission was tasked with

And Jeff Baran, a Democratic member of the Nuclear Regulatory Commission who was renominated by President Trump, is also a former Democratic congressional aide who was initially appointed by President Obama and who made contributions to both the Obama and Hillary Clinton presidential campaigns. See Press Release, White House Office of the Press Sec’y, President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/president-donald-j-trump-announces-intent-nominate-personnel-key>; Commissioner Jeff Baran, U.S. Nuclear Regulatory Comm’n, <https://www.nrc.gov/about-nrc/organization/commission/baran.html> (last updated Sept. 5, 2017); Donor Lookup, OpenSecrets.org, <https://www.opensecrets.org/donor-lookup/results?name=jeff+baran> (last visited Sept. 11, 2017) (search results for “Jeff Baran”).

²² Bloomberg News observed in June 2017 that President Trump “has been aggressive in moving to fill open Republican seats at the CFTC” but “hasn’t yet tapped any Democrats to join the CFTC.” Benjamin Bain, Lone Democrat on U.S. Swaps Regulator to Leave Before Term Ends, Bloomberg (June 20, 2017), <https://www.bloomberg.com/news/articles/2017-06-20/lone-democrat-on-u-s-swaps-regulator-to-leave-before-term-ends>. Several weeks later, President Trump nominated a Democrat to the commission. See Rubin & Ackerman, *supra* note 21.

²³ Act of Mar. 22, 1882, ch. 47, 22 Stat. 30 (1882); see Krotoszynski et al., *supra* note 15, at 964.

enforcing the anti-polygamy requirements. Section 9 of the Act stated that the board should consist of “five persons, to be appointed by the President, by and with the advice and consent of the Senate, *not more than three of whom shall be members of one political party.*”²⁴ Similar PBRs appeared in several more 19th century statutes, including the Pendleton Act of 1883, which created the Civil Service Commission;²⁵ the Interstate Commerce Act of 1887,²⁶ which created the Interstate Commerce Commission; and an 1890 law establishing a nine-member board of general appraisers that would ascertain the value of merchandise for customs purposes.²⁷ Congress also included PBRs in a number of statutes creating commissions to negotiate treaties with Indian tribes at the century’s end.²⁸ Perhaps not coincidentally, the 1880s also saw a national movement for civil service reform, and these first PBRs limited the President’s ability to adopt a “to the victor go the spoils” posture in appointments.²⁹ Yet these first few PBRs do not appear to have elicited much discussion in the House or in the Senate, and—speculation aside—the initial reason for their insertion remains obscure.³⁰

The presidency of Woodrow Wilson brought with it the next golden age of PBRs. Wilson’s first term saw the creation of five major multimember agencies with PBRs in their organic statutes: the Federal Trade Commission,³¹ the Federal Farm Loan Board,³² the U.S. Shipping Board,³³ the U.S. Employees’ Compensation Commission,³⁴ and the United States Tariff Commission.³⁵ At the time, senators suggested that PBRs would make agencies less prone to partisan bias and more likely to act on the basis of expertise—though precisely how PBRs might produce these results remained unspecified.³⁶

The creation of new agencies with PBRs in their organic statutes has continued ever since. In the last century, Congress has established at least 40 bodies subject to PBRs.³⁷ Most of these statutes provide for an odd number of members, no

²⁴ Act of Mar. 22, 1882, ch. 47, § 9, 22 Stat. at 32 (emphasis added).

²⁵ Act of Jan. 16, 1883, ch. 27, 22 Stat. 403; see Krotoszynski et al., *supra* note 15, at 966.

²⁶ Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (1887).

²⁷ Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136.

²⁸ See Act of Mar. 2, 1889, ch. 412, § 14, 25 Stat. 980, 1005; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 354; Act of July 13, 1892, ch. 164, 27 Stat. 120, 138, 139; Act of June 10, 1896, ch. 398, 29 Stat. 321, 342. Justice Brandeis documents the early history of PBRs in his dissent in *Myers v. United States*, 272 U.S. 52, 240, 270 n.51 (1926).

²⁹ See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L.J.* 1362, 1389 (2010).

³⁰ See Krotoszynski et al., *supra* note 15, at 964-65, 967.

³¹ Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717.

³² Act of July 17, 1916, ch. 245, § 3, 39 Stat. 360.

³³ Act of Sept. 7, 1916, ch. 451, § 3, 39 Stat. 728, 729.

³⁴ Act of Sept. 7, 1916, ch. 458, § 28, 39 Stat. 742, 748.

³⁵ Act of Sept. 8, 1916, ch. 463, § 700, 39 Stat. 756, 795.

³⁶ See Krotoszynski et al., *supra* note 15, at 969--70.

³⁷ See *id.* at 1009-1017 tbls.1--3.

more than a bare majority of whom may be from the same political party. The organic statutes of a small handful of agencies (most significantly, the Federal Election Commission) provide for an even number of members, with no more than half from the same party.³⁸

Significantly, the PBR provisions in agency organic statutes do not technically require a Democratic President to appoint Republicans or a Republican President to appoint Democrats. For example, the Equal Employment Opportunity Commission's organic statute states that "not more than three [of the five commissioners] shall be members of the same political party."³⁹ Thus, a Republican President could appoint three Republican commissioners and two independents (or, for that matter, two Libertarians), rather than naming two Democrats. In practice, though, we see very few cases of Presidents naming independents to cross-party posts on PBR agencies. Indeed, in our review of 216 cross-party appointments to 23 PBR agencies over the 1979-2014 time period, we have identified only seven cases in which a President named an independent at a time when a PBR prohibited him from appointing a member of his own party to an agency.

These seven cases, moreover, do not suggest a pattern of Presidents attempting to manipulate PBRs by filling cross-party seats with likeminded independents. Three of the seven cases involved a Democratic President filling a cross-party seat with an appointee who, though registered as an independent, had previously worked as an aide to a Republican senator.⁴⁰ Two more involved Republican Presidents filling cross-party seats with independents who would later be chosen by Democratic Presidents for positions to which the Democratic President could have named a Democrat—an indication that the individual, though registered as an independent, was generally aligned with the Democratic Party.⁴¹ One case

³⁸ See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 1, 90 Stat. 475, 475 (codified as amended at 52 U.S.C. § 30106(a)(1)). Other extant agencies with an even number of members and a requirement that no more than half hail from the same party include the International Trade Commission, 19 U.S.C. § 1330(a), and the Election Assistance Commission, 52 U.S.C. § 20923.

³⁹ See 42 U.S.C. § 2000e-4(a).

⁴⁰ The three are: Don Zimmerman, appointed by President Carter to the NLRB in 1980; Reginald Jones, appointed by President Clinton to the EEOC in 1996; and Jackie Clegg, appointed by Clinton to the Export-Import Bank in 1997. See James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994*, at 245-46 (1995) (noting that Zimmerman had served as an adviser to Republican Senator Jacob Javits of New York); Lee Davidson, *Utah Nominee Gets High Marks*, *Deseret News* (Salt Lake City) (May 23, 1997) (noting that Clegg had served as an aide to Republican Senator Jake Garn of Utah); Press Release, White House, *President Clinton Names Reginald Jones to the Equal Employment Opportunity Commission* (June 5, 1996) (noting that Jones was at the time senior legislative counsel to Republican Senator James Jeffords of Vermont).

⁴¹ The two are: Mary Schapiro, appointed by President Reagan to the SEC in 1988 and reappointed by President George H.W. Bush in 1989; and Thomas Curry, appointed to the FDIC by President George W. Bush in 2003. See Vicky Stamas, *President to Nominate Reum to Fill Position Remaining at the SEC*, *Bond Buyer*, Aug. 21, 1992, at 5 (noting that Schapiro was independent in cross-party seat); Robert D. Hershey, Jr., *Clinton Expected to Name S.E.C. Member to Head C.F.T.C.*, *N.Y. Times*

involved President Clinton appointing an independent to the National Transportation Safety Board who had been recommended by the Board's outgoing Republican member.⁴² Indeed, in only one case did we find any record of complaints that the President had appointed an independent rather than a member of the opposite party to fill a cross-party seat.⁴³

The only agency at which Presidents have repeatedly sought to fill cross-party seats with ideologically sympathetic independents is—perhaps surprisingly—an agency with no regulatory authority: the U.S. Commission on Civil Rights.⁴⁴ (We exclude the Commission on Civil Rights from our dataset because of its lack of authority to bind others through regulation, adjudication, or enforcement, as well as the fact that half of its members are chosen by Congress rather than the President and its members generally serve part-time.⁴⁵) The commission's organic statute states that “[n]ot more than 4 of the [8] members shall at any one time be of the same

(May 3, 1994), <http://www.nytimes.com/1994/05/03/business/clinton-expected-to-name-sec-member-to-head-cftc.html> (reporting that President Clinton would name Schapiro to chair CFTC at time when commission already had two Republican members, and so Clinton could have named a fellow Democrat); Kathleen Pender, *Mary Schapiro's Mixed Marks as SEC Head*, S.F. Chron. (Nov. 26, 2012), <http://www.sfgate.com/business/networth/article/Mary-Schapiro-s-mixed-marks-as-SEC-head-4068463.php> (noting that Schapiro, named by President Obama in 2009 to chair the SEC, served with two Republicans, meaning that Obama could have named a third registered Democrat instead of Schapiro); Hannah Bergman, *FDIC Board Is Factor in OCC Choice*, Am. Banker, Jan. 12, 2005, at 1 (noting that Thomas Curry was an independent named by President George W. Bush to a cross-party seat); Binyamin Appelbaum, *Official From F.D.I.C. Picked To Lead Banking Regulator*, N.Y. Times (July 1, 2011), <http://www.nytimes.com/2011/07/02/business/02currency.html> (noting President Obama's nomination of Curry to be Comptroller of the Currency, a position not subject to a PBR).

⁴² This was John Goglia, appointed by President Clinton to the NTSB in 1995 and reappointed in 1999. See Matthew Brelis, *US Transportation Appointee Brings Hands-On View; 29 Years as Air Mechanic Won Spot for Saugus Man*, Bos. Globe, Oct. 10, 1995, at 18.

⁴³ This was Mary Azcuenaga, named by President Reagan to the FTC in 1984. Her appointment generated grumbling from one Democratic senator, who “wondered why Mr. Reagan, if he wants to appoint independents, cannot pick them for Republican seats.” Robert D. Hershey Jr., *Washington Watch: No Democrats Seen for F.T.C.*, N.Y. Times (Oct. 28, 1985), <http://www.nytimes.com/1985/10/28/business/washington-watch-no-democrats-seen-for-ftc.html> (paraphrasing Senator Wendell Ford, Democrat of Kentucky). However, Azcuenaga was also reportedly viewed favorably by the outgoing Democratic commissioner whom she replaced. See Thomas Ferraro, *Reagan Expected To Name Woman To Replace FTC's Pertschuk*, UPI (Aug. 14, 1984), <http://www.upi.com/Archives/1984/08/14/Reagan-expected-to-name-woman-to-replace-FTCs-Pertschuk/9862461304000> (quoting aide to outgoing Democratic commissioner who said that the commissioner “respects” Azcuenaga and was “relatively pleased” that she would be his successor).

⁴⁴ See Charlie Savage, *Manuever Gave Bush a Conservative Rights Panel*, Bos. Globe (Nov. 6, 2007), http://archive.boston.com/news/nation/articles/2007/11/06/maneuver_gave_bush_a_conservative_rights_panel (“Especially since the 1980s, presidents and lawmakers have tried to tilt the panel by appointing independents who shared their party's views on civil rights.”).

⁴⁵ Of the commission's eight members, four are appointed by the President, two are appointed by the President Pro Tempore of the Senate on the recommendation of the Senate Majority and Minority Leaders, and two are appointed by the Speaker of the House on the recommendation of the House Majority and Minority Leaders. 42 U.S.C. § 1974(b).

political party.”⁴⁶ The meaning of this provision was tested in 2003 and 2004, when two Republican members of the commission changed their registration to independent.⁴⁷ Their switches allowed President George W. Bush to name two additional Republicans to the commission, bringing the number of Republican or recently-Republican members of the panel to six.⁴⁸ At the time, the Office of Legal Counsel in the Justice Department issued an opinion stating that, for purposes of the statutory PBR, “the relevant consideration is the party affiliation of the other members at the time the new member is appointed.”⁴⁹ In the Office of Legal Counsel’s view, application of the statutory PBR did not require looking beyond party registration to determine the partisan identity of a prospective or current commissioner.

Aside from the Office of Legal Counsel’s opinion, there is very little legal precedent regarding the interpretation or application of partisan balance requirements in agency organic statutes. The constitutionality of PBRs has been challenged in two cases, but the courts did not reach the merits of the constitutional issue in either case. In *Federal Election Commission v. NRA Political Victory Fund*, the National Rifle Association’s political action committee argued that the provision in the six-member Federal Election Commission’s organic statute capping the number of commissioners from any political party at three violated the President’s appointment power.⁵⁰ The D.C. Circuit rejected the argument on standing grounds, reasoning that “it is impossible to determine in this case whether the *statute* actually limited the President’s appointment power” because it was not clear that the President otherwise would have sought to appoint more than three commissioners from his own party.⁵¹ In *National Committee of the Reform Party v. Democratic National Committee*, the Ninth Circuit rejected a challenge to the Federal Election Commission’s partisan balance requirement on similar grounds, emphasizing that “without the statute the President could have appointed exactly the same members.”⁵²

We know of no case in which a litigant has sought judicial enforcement of a PBR—i.e., has argued for the invalidation of an agency action on the grounds that a commission had too many members of the same party. At the same time, we have found no reported instances of outright PBR violations—no case, that is, where a President has sought to exceed the statutory cap on commissioners from a single party. The letter, if not the spirit, of PBRs is followed uniformly. But to say that PBRs are followed as a technical matter does not explain what substantive effects

⁴⁶ *Id.*

⁴⁷ See Savage, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ Political Balance Requirement for the Civil Rights Commission, 28 Op. O.L.C. 295 , 295 (Dec. 6, 2004).

⁵⁰ 6 F.3d 821, 824-25 (D.C. Cir. 1993).

⁵¹ *Id.*

⁵² 168 F.3d 360, 365 (9th Cir. 1999) (quoting *NRA Political Victory Fund*, 6 F.3d at 825) (internal quotation marks omitted).

these provisions have. The following section turns to that question and surveys the scant scholarly literature that exists to date.

B. Do Partisan Balance Requirements Bite?

Our central aim is to test the hypothesis that partisan balance requirements affect the ideological composition of multimember agencies. A contrary view posits that cross-party commissioners “come in sheep’s clothing” and do not differ from a President’s co-party appointees in any way other than the superficial fact of party registration.⁵³ One scholar has noted the example of Ray Wakefield, a nominally Republican but questionably conservative Roosevelt nominee to the FCC.⁵⁴ Timothy Nokken and Brian Sala cite examples from the Eisenhower, Kennedy, Nixon, and Carter administrations.⁵⁵ An especially notorious example from the Nixon administration is that of James Quello, a nominally cross-party appointee to the FCC who—despite his Democratic affiliation—donated \$1,100 to Nixon’s reelection effort in 1972.⁵⁶ A report commissioned by the Senate Commerce Committee and completed at the end of the Ford presidency concluded that cross-party appointees “typically” support the President who selected them.⁵⁷ Alan Morrison observed at the end of the Reagan years that the outgoing President had “largely succeeded” in “placing in all agencies, independent and otherwise, those who believe firmly in the Reagan view of government—Democrats as well as Republicans.”⁵⁸ And Senator

⁵³ See Ho, *supra* note 3 (manuscript at 2--3) (collecting sources that make this claim).

⁵⁴ Lawrence W. Lichty, *Members of the Federal Radio Commission and Federal Communications Commission 1927-1961*, 6 *J. Broad.* 23, 25 (1961); accord Wenmouth Williams, Jr., *Impact of Commissioner Background on FCC Decisions: 1962-1975*, 20 *J. Broad.* 239, 241 (1976) (concluding that “party affiliation has not been a reliable predictor of voting” on the FCC).

⁵⁵ Timothy P. Nokken & Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 *J. Theoretical Pol.* 91, 95 (2000). In particular, Nokken and Sala note that President Eisenhower appointed two nominally Democratic FTC commissioners whose ideological loyalties were suspect: Robert Secrest, a conservative Democratic Congressman from Ohio, and William Kern, previously an FTC staff member “whose principal Democratic credentials were that his father had been William Jennings Bryan’s running mate in 1908.” Nokken and Sala add that “Kennedy and Nixon adopted similar appointment strategies by appointing liberal ‘Lindsay Republicans’ and conservative ‘Connally Democrats,’ respectively.” And they further mention the case of Frank Reiche, one of President Carter’s cross-party appointees to the FEC, whom some Republican senators opposed because he was not sufficiently conservative. *Id.* at 95 & n.6; see also Princeton Attorney Confirmed to Post on Election Panel, *Ashbury Park (N.J.) Press*, July 26, 1979, at 62 (noting that 21 out of 41 Republican senators voted against Reiche, with some conservative Republicans saying that he did not represent their views).

⁵⁶ See Graham & Kramer, *supra* note 2, at 357-367.

⁵⁷ *Id.* at 366.

⁵⁸ Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 *Duke L.J.* 252, 253-54.

Bob Dole once accused President Clinton of appointing “Clinton Republicans” to cross-party seats.⁵⁹

We know of only one study other than our own that undertakes a quantitative cross-commission analysis of the effect of PBRs on the ideological composition of multimember agencies: the 1964 study by Stuart Nagel and Martin Lubin referenced above. Nagel and Lubin focus on seven commissions: the now-defunct Civil Aeronautics Board and Interstate Commerce Commission, the FCC, the Federal Power Commission (now the Federal Energy Regulatory Commission), the NLRB, and the SEC. They draw data from three years each spaced a decade apart: 1936, 1946, and 1956.⁶⁰ They consider a decision to be “liberal” if it goes “in favor of the consumer, shipper, or investor (rather than the seller, producer, transporter, or broker), in favor of labor (rather than management), in favor of a small business or increased competition (rather than a larger firm or decreased competition).”⁶¹ They report whether commissioner are above or below their agencies’ average liberalism score. On this dimension, Democrats appointed by Republican Presidents are most likely to be above their agency’s average liberalism score (64%), followed by Democrats appointed by Democratic Presidents (54%), followed by Republicans appointed by Democratic Presidents (46%), followed by Republicans appointed by Republican Presidents (33%).⁶² The findings are reported in a way that makes it impossible to determine just how much PBRs affect voting behavior, though the results seem to suggest that PBRs lead Republican Presidents to choose somewhat more liberal commissioners and lead Democratic Presidents to select somewhat more conservative appointees.

While these results are suggestive, Nagel and Lubin’s method of categorizing decisions as “liberal” and “conservative” is certainly vulnerable to critique. First, the terms “liberal” and “conservative” are not easy to operationalize—and any attempt to do so inevitably imports biases. (Why do we think liberals are more likely to favor “increased competition,” and how should we code cases where the competitive consequences are hotly disputed?) Second, the types of cases that will reach an adjudicatory commission may vary with the commission’s ideological composition—the administrative law version of the Priest-Klein effect familiar from the civil procedure literature.⁶³ Individual workers and labor unions may be more likely to bring ambitious cases to the NLRB when they know that the board has a

⁵⁹ Al Kamen, *Who’s Republican? And Who’s to Decide?*, Wash. Post (Sept. 6, 1993), https://www.washingtonpost.com/archive/politics/1993/09/06/whos-republican-and-whos-to-decide/8a85544f-f1a1-4558-ac1f-5c498e5609e6/?utm_term=.a10e33cb8cfe.

⁶⁰ Nagel & Lubin, *supra* note 5 at 39.

⁶¹ *Id.* at 40.

⁶² *Id.* at 42 tbl.1.

⁶³ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984) (suggesting that the disputes that reach litigation are ones in which each party has close to a 50% probability of victory).

liberal majority; likewise for employers when they know that the board tilts toward the right.

Daniel Ho's methodologically rigorous study of voting patterns among FCC commissioners addresses the first of these two aforementioned imperfections of the Nagel and Lubin study. Ho pioneers an approach—a Bayesian multilevel ideal point model of mixed ordinal votes—to map votes onto a unidimensional spectrum without requiring researchers to decide which positions are “liberal” and which ones are “conservative.”⁶⁴ As Ho summarizes, his analysis of the FCC suggests that most cross-party appointees are “genuine”: with a small number of exceptions, “[c]ross-party appointees don't don sheep's clothing.”⁶⁵ In other words, Democratic commissioners appointed by Republican Presidents to satisfy the statutory PBR appear to be relatively liberal, and Republican commissioners appointed by Democratic Presidents to satisfy the statutory PBR appear to be relatively conservative. Somewhat surprisingly, the most conservative commissioner according to Ho's estimates is a Republican appointed by Democratic President Clinton, and the three most liberal commissioners are Democrats appointed by Republican Presidents Reagan, George H.W. Bush, and George W. Bush.⁶⁶

Ho's study of the FCC provides us with extraordinarily useful insights regarding voting behavior at a single agency. But while Ho's single-agency analysis suggests that partisan balance requirements do “bite,” it is not clear whether his FCC-specific results are generalizable to other multimember agencies.⁶⁷ Unfortunately, Ho's innovative method cannot be applied broadly beyond the FCC: his method relies on having a large set of non-unanimous commission votes to analyze, but at many multimember agencies—including the Federal Election Commission, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission—dissents and concurrences are rare.⁶⁸ For this reason, we look to other data sources and methodological approaches in order to assess the cross-agency effects of PBRs.

⁶⁴ Ho, *supra* note 3.

⁶⁵ Id. (manuscript at 19, 24).

⁶⁶ Id. (manuscript at 21 fig.4).

⁶⁷ The FCC is, by many accounts, a particularly politicized agency. See Benjamin Kapnik, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 *Geo. Wash. L. Rev.* 1527, 1528 (2012) (“The FCC has long been considered a politicized agency”); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 *Admin. L. Rev.* 675, 689 (2009) (noting “super-politicized” environment at FCC). Cf. Kimberly A. Zarkin & Michael J. Zarkin, *The Federal Communications Commission: Front Line in the Culture and Regulation Wars* 49 (2006) (“[T]he FCC is an organization that is particularly open to interference by outside forces.”). While these characterizations are difficult to verify, they cast doubt on the external validity of FCC-specific findings.

⁶⁸ See *id.* (manuscript at 8 tbl.1) (showing that the number of dissents and concurrences per commissioner is 172 for the FCC, compared to 4 for the FEC, 12 for the FTC, 3 for the NRC, and 6 for the SEC).

Ho's study also does not seek to determine *why* PBRs might be effective. The next Section turns to that question and sets forth two theories with testable implications that might explain the efficacy of these provisions. In Part II, we go on to consider whether PBRs do in fact affect the ideological composition of multimember agencies, and we assess the evidence in support of our two separate theories.

C. *Why Might Partisan Balance Requirements Bite?*

We focus here on two causal mechanisms that might explain why PBRs affect the ideological composition of multimember agencies: a *supply-side theory* and a *demand-side theory*. In the “market” for commissioners, the President draws from a limited supply of individuals with the experience and expertise to serve competently on multimember federal agencies. The President then must “sell” his nominee to sometimes-skeptical senators—the consumers in our market metaphor. If PBRs do indeed affect the ideological composition of multimember agencies, it may be due to supply-side constraints, or demand-side constraints, or both.

1. The Supply-Side Theory

The supply-side theory holds that the President selects from a pool of potential cross-party appointees that is dominated by individuals whose ideological preferences differ from the President's own. Consider the challenge facing a Democratic President who is filling a seat on the five-member FCC at a time when the FCC already has three Democratic members (its maximum number of same-party commissioners). Presumably the President cares at least somewhat about the competence of commissioners, and so desires an appointee with relevant experience in communications law or policy. The pool of individuals who have such experience and who are not members of the Democratic Party will be weighted toward moderates and conservatives. While it might not be impossible for the Democratic President to find a liberal non-Democrat who also has relevant qualifications for the commissionership, it is—at the very least—easier for a Democratic President to draw liberals from within the President's own party than from without.

The plausibility of the supply-side theory depends on the strength of the relationship between partisanship and ideology. If the Republican Party includes large pools of liberals as well as conservatives, then a Democratic President making a cross-party appointment can satisfy the PBR by selecting a relatively liberal Republican. Partisan sort, however, undermines the ability of Democratic Presidents to find ideologically sympathetic Republicans to fill posts on multimember agencies (and likewise for Republican Presidents seeking out ideologically sympathetic Democrats).

The political science literature on partisan sort distinguishes between “elite polarization” and “mass polarization.” By “elites” (or alternatively, the “political class”), we refer to public officials, interest group leaders, activists, substantial donors, and political commentators.⁶⁹ While the extent to which mass polarization has occurred is contested,⁷⁰ there is close to a consensus that elites have become more polarized over the course of the past several decades.⁷¹ Because appointees to multimember agencies are generally drawn from the “political class,”⁷² elite polarization rather than mass polarization is the more relevant phenomenon for our purposes. By most measures, the partisan sorting of elites accelerated in the mid- to late-1970s and has continued to pick up steam ever since.⁷³ On most accounts, the partisan realignment of the South—with white conservative Democrats moving to the Republican Party—was an important but nonexclusive factor contributing to partisan sort.⁷⁴ Whatever the causes, few scholars would dispute that ideology is a stronger predictor of partisan affiliation today than it was 25 to 35 years ago.⁷⁵

⁶⁹ See Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class versus the People, in I Red and Blue Nation?: Characteristics and Causes of America’s Polarized Parties* 50 (Pietro S. Nivola & David W. Brady eds., 2006).

⁷⁰ Compare Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 *J. Pol.* 634, 649 (1998) (“The increasing ideological polarization of the Democratic and Republican Parties in the Reagan and post-Reagan eras made it easier for voters to recognize the differences between the parties’ policy stands. As a result, voters have been choosing their party identification on the basis of their policy preferences rather than maintaining the party allegiance that they inherited from their parents.”), with Morris P. Fiorina, Samuel A. Abrams & Jeremy C. Pope, *Polarization in the American Public: Misconceptions and Misreadings*, 70 *J. Pol.* 556, 558 (2008) (stating that “party sorting has proceeded much less in the general public than among party elites”).

⁷¹ See Fiorina et al., *supra* note 70, at 557 (“There is general agreement that party elites have become significantly more distinct over the course of the past several decades . . .”).

⁷² See *supra* note 107 (comparing the propensity of PBR appointees to contribute to political candidates to the propensities of Obama appointees, Fortune 500 CEOs, former Supreme Court clerks to do so).

⁷³ See, e.g., Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 *Polity* 411, 415 (2014) (observing— on the basis of voting patterns among members of the House and Senate—that “the parties began to diverge in the mid-1970s and this trend has continued unabated into the most recent Congress”); Marc J. Hetherington, *Resurgent Mass Polarization: The Role of Elite Polarization*, 95 *Am. Pol. Sci. Rev.* 619, 622-23 (2001) (observing—also on the basis of congressional voting patterns—that polarization reached a “trough” in the mid-1970s but began a “steady rise” starting with the Carter years, and a “second spike” in the last two years of George H.W. Bush’s presidency).

⁷⁴ See Hare & Poole, *supra* note 73, at 417 (“[T]he southern realignment does not fully account for the increase in polarization. The Republican Party became much more conservative across all regions of the United States.”); Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 *Presidential Stud. Q.* 688, 691 (2013) (stating that the “main source” of polarization was “the partisan realignment of the South,” but noting that “[c]onservative whites outside the South also moved toward the Republican Party, while liberals became overwhelmingly Democratic”).

⁷⁵ See, e.g., Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 *J. Pol.* 1 (2009).

The following figure provides one window on this partisan sort. The figure uses DW-NOMINATE ideal point estimates, i.e., estimates of legislators' ideological preferences based on their roll call voting records, to track partisan sort over the past 50 years.⁷⁶ The solid red line charts the median Republican House member's ideal point from 1963 (close to the nadir of polarization in the 20th century) through 2013; the dotted, light blue and dashed, dark blue lines report those values for the median southern and non-southern Democratic representative, respectively. The figure illustrates two reasons why partisan sort has occurred: (1) the Republican Party became more conservative over a half century; and (2) southern (but not northern) Democrats became more liberal.⁷⁷ The latter phenomenon is attributable to the fact that a large number of white conservatives in the South have changed their party affiliation from Democratic to Republican, leaving a more liberal and largely African-American Democratic Party in southern states.⁷⁸

⁷⁶ Data derived from Keith Poole & Howard Rosenthal, "Party Medians from DW-NOMINATE, Congresses 1-113" [data file], Voteview, *available at* <https://legacy.voteview.com/pmediant.htm> (last visited June 20, 2017). DW-NOMINATE arranges legislators on a -1 to 1 scale based on their roll call voting records, placing legislators with similar voting records close together on the scale. The measure does not consider the content of the roll call votes. Once the algorithm is run for a large set of votes, the optimal placement of legislators along with scale makes it obvious to any political observer that legislators placed near -1 are very liberal and those placed near 1 are very conservative. See Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (2000).

⁷⁷ As the figure shows, the trend toward polarization is asymmetric, with greater movement away from the middle among Republicans than among Democrats. See also Nolan McCarty, Howard Rosenthal, & Keith T. Poole, *Polarized America: The Dance of Ideology and Unequal Riches* 12 (2006) (noting that "Republicans in the North and South have moved sharply to the right," while "Northern Democrats . . . don't look sharply different from Democrats of old").

⁷⁸ See Nelson Polsby, *How Congress Evolves* 151 (2005).

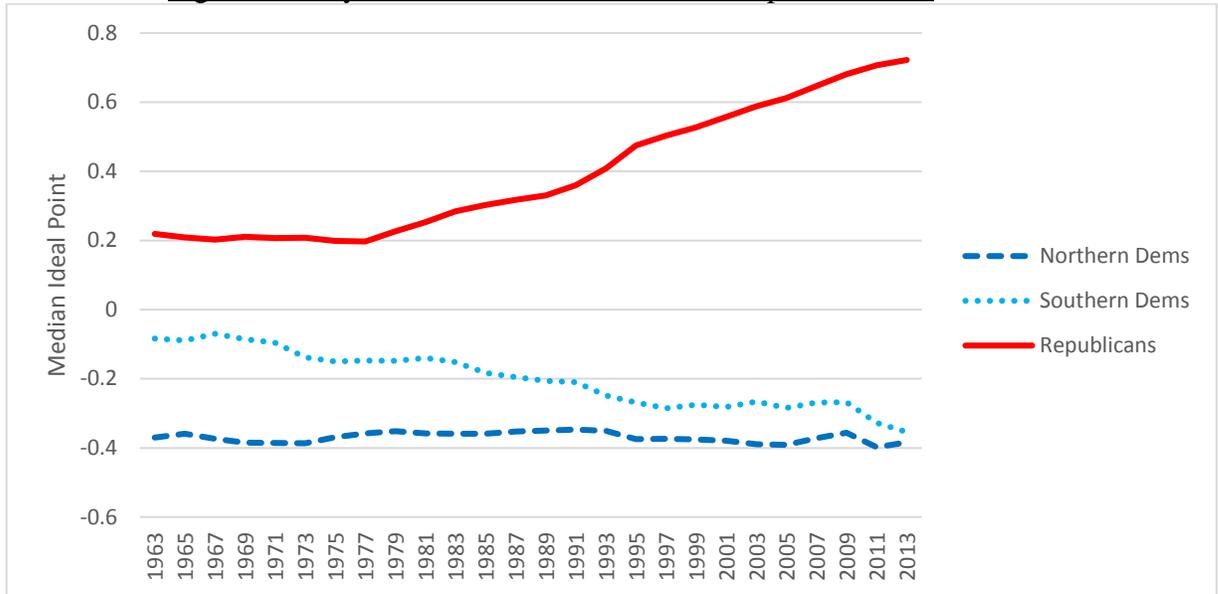
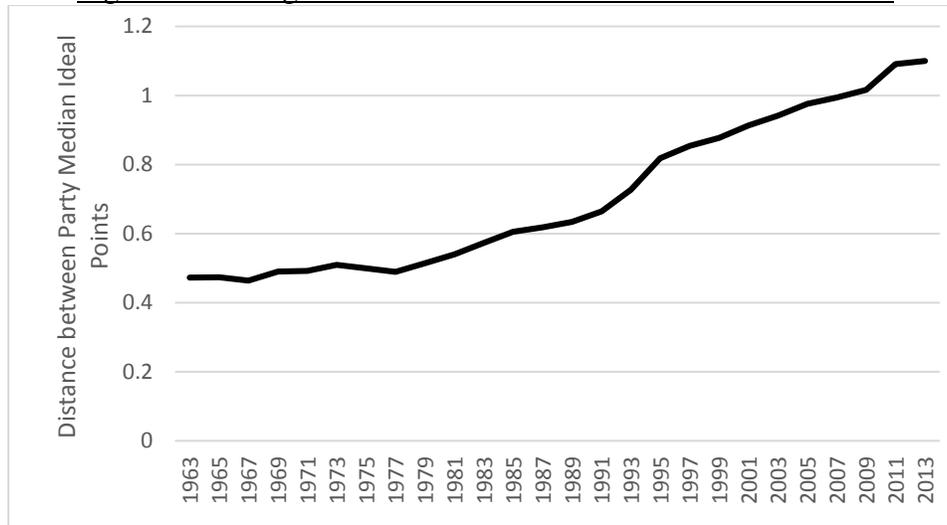
Figure 1: Party Polarization in the House of Representatives

Figure 2 provides another perspective on partisan sort. It shows the gap in DW-NOMINATE scores for the median Democratic and Republican members of the House between 1963 and 2013. The takeaway from Figures 1 and 2 is clear: the parties have become more ideologically distinct over the past 50 years. The increase has been nearly monotonic, with polarization accelerating in the second half of this period.

Figure 2: Ideological Distance Between the Parties in the House

The phenomenon of partisan sort has clear implications for the ideological composition of multimember agencies subject to PBRs. In the late 1970s and early 1980s, when both parties remained relatively ideologically heterogeneous at the elite level, we might expect the effect of PBRs on ideological composition to be muted. A Democratic President making a cross-party appointment would not be forced to choose from among conservatives; likewise, a Republican President would likely be able to find qualified Democrats who were not liberals. But as partisan sort accelerated over the last two decades of the 20th century and the beginning of the 21st, we might expect the effect of PBRs on ideological composition to grow stronger. That is, insofar as supply-side constraints account for the effect of PBRs on the ideological composition of multimember agencies, we might expect that effect to increase as supply-side constraints become more binding.

Accordingly, one way to assess the plausibility of the supply-side theory is to look at whether the effect of PBRs on the ideological composition of multimember agencies has increased over time. If it has, then that finding would place the supply-side theory on firmer footing. We will defer further discussion of this point until Part II, where we conduct tests to determine whether the effect of PBRs on ideological composition is temporally dependent. But first, we consider whether PBRs might affect ideological composition through an alternative causal mechanism.

2. The Demand-Side Theory

Once a President has selected a nominee for an agency post, he must “sell” that nominee to the Senate. The confirmation hurdle imposes a potential demand-side constraint on the President’s ability to stock multimember agencies with ideologically sympathetic appointees. Senators from the opposition party may use what leverage they have to ensure that the President selects a “bona fide” member of the opposition party when a PBR forces a cross-party appointment.⁷⁹ To satisfy senators—the “consumers” in our market metaphor—the President may have to honor the spirit of PBRs when choosing cross-party commissioners.

Insofar as demand-side constraints compel Democratic Presidents to choose conservative Republican commissioners and Republican Presidents to name liberal Democrats, we might expect these constraints to be most binding under conditions of divided government. Presumably, the Senate is more likely to stop a Democratic President from appointing a liberal Republican to satisfy a PBR when the Senate is Republican-controlled than when the Democrats have a majority (and vice versa when it is a Republican President seeking to place a conservative Democrat on a commission). To be sure, even a minority opposition party in the Senate has

⁷⁹ See Neal Devins & David E. Lewis, Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design, 88 B.U. L. Rev. 459, 488 (2008) (“[O]pposition Senators regularly use holds and other delaying strategies to pressure the President to appoint party loyalists to slots held by opposition-party members.”).

historically been able to stop a nominee from being confirmed through the filibuster, provided that it could muster 41 votes. But with the abolition of the filibuster for agency nominees in November 2013,⁸⁰ the minority party in the Senate no longer has this weapon in its arsenal.

The demand-side theory, like the supply-side theory, leads us to expect that the effect of PBRs on the ideological composition of multimember agencies would vary across time. In particular, we might expect the effect to be strongest when the White House and Senate are controlled by different parties, and so the Senate can easily block a cross-party appointee who is ideologically sympathetic to the President. We might also expect the effect to be especially weak in the few periods when the President's party has held a filibuster-proof Senate majority. Our dataset encompasses two such periods—both under President Obama. First, the Democrats held 60 Senate seats from July 2009 (after Democrat Al Franken was sworn in as senator from Minnesota⁸¹) until January 2010 (when the Democrats lost a Senate seat from Massachusetts following Republican Scott Brown's victory in a special election).⁸² And second, after the Senate eliminated the filibuster for votes on the confirmation of nominees to non-Supreme Court appointments in November 2013, the Democrats retained a narrow majority until January 2015 (55-45, including two independents who caucused with the Democrats).

In the next Part, we examine whether PBRs do indeed affect the ideological composition of multimember agencies—and, if so, why. Our approach allows us to test both the supply-side and demand-side theories, and to reach tentative conclusions as to why PBRs might have real world consequences.

II. AN EMPIRICAL ANALYSIS OF PARTISAN BALANCE REQUIREMENTS

This Part presents our empirical analysis of the effect of partisan balance requirements on the ideological composition of multimember agencies. Section II.A describes our data and explains our research design. Section II.B presents initial results. Section II.C considers supply-side and demand-side explanations for the efficacy of PBRs.

A. *Data & Research Design*

⁸⁰ See Paul Kane, Reid, Democrats Trigger 'Nuclear' Option; Eliminates Most Filibusters on Nominees, *Wash. Post* (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

⁸¹ See Mark Zdechlik, Franken Brings 60th Vote to Senate Dems, *Minn. Pub. Radio* (July 1, 2009), <https://www.mprnews.org/story/2009/07/01/franken60>.

⁸² See Michael Cooper, G.O.P. Senate Victory Stuns Democrats, *N.Y. Times* (Jan. 19, 2010), <http://www.nytimes.com/2010/01/20/us/politics/20election.html>.

To explore the relationship between the partisan and ideological outlooks of appointees to agencies with partisan balance requirements (PBR agencies), we first must define the population of PBR agencies. Then, we must identify both the partisan identification and ideological orientation for each appointee to these PBR agencies. This section details our process for collecting data on (1) PBR agencies, (2) appointee partisanship, and (3) appointee ideology.

1. Agencies with Partisan Balance Requirements

PBR agencies share one essential attribute: a restriction, grounded in statute or deeply entrenched norm, on the number of individuals from the same political party that may be appointed to the agency's multi-member governing board. We examined appointments to 23 agencies⁸³ that meet this definition and that were in existence during the entire 1979-2014 period.⁸⁴

With the exception of the NLRB, these agencies' party balance requirements are imposed by statute.⁸⁵ (We classify the NLRB as a PBR agency based on a firmly entrenched norm favoring partisan balance on that body.⁸⁶) The structural features of these agencies vary considerably. Table 1 reports the presence or absence of design features in these agencies that, along with PBR, are commonly considered to be indicia of agency independence.⁸⁷

⁸³ These 23 PBR agencies are: the Commodity Futures Trading Commission (CFTC), Consumer Product Safety Commission (CPSC), Defense Nuclear Facilities Safety Board (DNFSB), Equal Employment Opportunity Commission (EEOC), Export-Import Bank (Ex-Im), Farm Credit Administration (FCA), Federal Communications Commission (FCC), Federal Deposit Insurance Corporation (FDIC), Federal Election Commission (FEC), Federal Energy Regulatory Commission (FERC), Federal Labor Relations Authority (FLRA), Federal Maritime Commission (FMC), Federal Trade Commission (FTC), Merit Systems Protection Board (MSPB), National Credit Union Administration (NCUA), National Labor Relations Board (NLRB), National Mediation Board (NMB), National Transportation Safety Board (NTSB), Nuclear Regulatory Commission (NRC), Postal Regulatory Commission (PRC), Securities and Exchange Commission (SEC), Surface Transportation Board (STB, formerly the Interstate Commerce Commission),⁸³ and U.S. International Trade Commission (USITC).

⁸⁴ See George A. Krause & Anne Joseph O'Connell, Replication Data for: Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointees, 60 *Am. J. Pol. Sci.* 914 (2016) [hereinafter Krause & O'Connell, Replication Data], available at <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/E9UQ0S> (last visited July 3, 2017); Datla & Revesz, *supra* note 1, at 784 & n.89; David C. Nixon, *The Independent Regulatory Commissioner Data Base* (2005), available at <http://www2.hawaii.edu/~dnixon/IRC/index.htm> (last visited July 3, 2017).

⁸⁵ See, e.g., 42 U.S.C. § 2000e-4(a) (mandating that the EEOC "be composed of five members, not more than three of whom shall be members of the same political party").

⁸⁶ See *infra* notes 127-128 and accompanying text.

⁸⁷ See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Texas L. Rev.* 15, 18 (2010); Datla & Revesz, *supra* note 1, at 784 & n.89 (2013). An agency's multimember structure is another common feature of independent agencies. See Barkow, *supra*, at 17;

For-cause removal protection prevents the President from removing an appointee at will, requiring that the President show cause to do so before the expiration of the appointee's term.⁸⁸ For instance, FTC commissioners may only be removed "for inefficiency, neglect of duty, or malfeasance in office."⁸⁹ Fixed terms in office further insulate appointees to PBR agencies from the White House, and thus provide a second indicium of agency independence.⁹⁰ The ability to pursue litigation independent of the Justice Department ("Litigation Authority"); bypass centralized OMB review and submit budgets directly to Congress ("Bypass Authority"); and craft policy through formal adjudication, which is less susceptible to political interference than rulemaking ("Adjudication Authority"), all foster agency independence as well.⁹¹ Finally, qualification requirements—e.g., that members of the National Transportation Safety Board possess transportation-safety-related professional credentials and experience⁹²—constrain the President's hand in appointments.⁹³

Datla & Revesz, *supra* note 1, at 792-97. Because all PBR agencies by definition are headed by multiple members, Table 1 omits this feature.

Among these 23 agencies, the NMB is an outlier in two respects. First, its power to bind outside parties is limited. The NMB can compel railroads or airlines and their employees to arbitrate labor disputes if certain conditions are met; if one party refuses to arbitrate, the NMB can authorize a labor strike or a lockout by management. 45 U.S.C. § 155. Second, its structure includes only three indicia of independence: fixed terms, PBRs and multi-member boards. Nonetheless, we think the NMB deserves inclusion. Given the historical significance of labor disputes in the railroad industry and the importance of the transportation sector to the national economy, the NMB's powers, though limited, are nontrivial. See Gabriel Kolko, *Railroads and Regulations 1* (2014). Further, fixed terms and PBRs—both of which the NMB has—are considered particularly important indicia of independence. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 188 *Duke L.J.* 257, 259 (1988). Nonetheless, excluding the NMB from our analysis does not materially change the results.

⁸⁸ See Barkow, *supra* note 87, at 27.

⁸⁹ 42 U.S.C. § 5841(e) (2006); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627-32 (1935). Neither Congress nor the Courts has defined these broad terms constituting good cause, however, see *Bowsher v. Synar*, 478 U.S. 714, 729 (1986), which raises the possibility that removal protections would not constrain a motivated President. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 110-11 (1994).

⁹⁰ See Peter L. Strauss, *An Introduction to Administrative Justice in the United States* 15 (1989).

⁹¹ Datla & Revesz, *supra* note 1, at 799--804 (regarding litigation authority); *id.* at 804--08 (bypass authority); *id.* at 808--12 (adjudication authority).

⁹² 49 U.S.C. § 1111(b).

⁹³ See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 *J. Pol.* 1095, 1098--99 (2002). We exclude U.S. citizenship requirements, which impose *de minimis* constraints on appointments, from our classification of qualification requirements.

Table 1: Characteristics of Included PBR Agencies⁹⁴

Agency	Removal Protection	Fixed Terms	Litigation Authority	Bypass Authority	Adjudication Authority	Qualification Requirements
CFTC		•	•	•	•	•
CPSC	•	•	•	•	•	•
DNFSB		•		•	•	•
EEOC		•	•		•	
Ex-Im		•	•			
FCA		•	•	•		•
FCC		•			•	
FDIC		•	•	•		•
FEC		•	•	•	•	•
FERC	•	•	•	•	•	•
FLRA	•	•	•		•	
FMC	•	•	•		•	
FTC	•	•	•		•	
MSPB	•	•		•	•	•
NCUA		•		•	•	•
NLRB	•	•	•		•	
NMB		•				
NTSB	•	•		•	•	•
NRC	•	•			•	
PRC	•	•		•	•	•
SEC		•	•	•	•	
STB / ICC	•	•	•	•	•	•
USITC		•	•	•		•

As Table 1 shows, these agencies vary considerably in terms of their particular mix of most of the other indicia of independence – except for the fact that all PBR agencies also feature statutorily mandated fixed terms for their commissioners or board members. That feature is remarkably common; among all executive agencies that are typically classified as independent, only four relatively minor agencies do not require set terms for their leaders.⁹⁵

⁹⁴ See Datla & Revesz, *supra* note 1, at 786 (identifying agencies with statutory removal protection); *id.* at 790 (fixed terms); *id.* at 800 (litigation authority); *id.* at 804 (bypass authority); *id.* at 809 (adjudication authority); Henry B. Hogue, *Statutory Qualifications for Executive Branch Positions*, CRS Rep. for Congress (Sept. 9, 2015), *available at* <https://fas.org/sgp/crs/misc/RL33886.pdf> (last visited July 3, 2017) (required qualifications).

⁹⁵ Datla & Revesz, *supra* note 1, at 790 (listing the Panama Canal Commission, Pension Benefit Guaranty Corporation, U.S. Trade & Development Agency, and U.S. Agency for International Development as the only independent agencies without specified tenure for appointees).

2. Appointee Party Identification

Having identified the set of PBR agencies for this study, we turn to determining the partisan affiliations of appointees to these agencies. For 11 agencies (the CPSC, EEOC, FCC, FEC, FERC, FTC, NLRB, NTSB, NRC, SEC, and STB), we obtained, from an executive-appointee biographical dataset compiled by George Krause and Anne Joseph O’Connell, the name, date of nomination, and partisan identification for each individual appointed between 1979 and 2008.⁹⁶ We then extended this analysis through 2014 via Congressional Research Service reports containing the same information for appointments made between 2000 at 2014.⁹⁷ To assess the reliability of both data sources, we examined the extent to which the two sources include identical information for appointees during the 2000-2008 period for which the two sources overlap. Inter-observer reliability between the two data sources is extremely high; the appointee names, nomination dates, and partisan affiliations reported in the two sources in this period were identical.

For the other 12 agencies, we built an original dataset that includes the name, date of nomination, and party affiliation for each individual appointed as a board member or commissioner from 1979 through 1999. We drew information on name and date of nomination from congressional records and determined partisan identifications from a variety of other sources, including newspaper reports around the time of nomination and obituaries of now-deceased appointees. Once again, we extended this analysis through 2014 via Congressional Research Service reports.

3. Appointee Ideology

⁹⁶ See George A. Krause & Anne Joseph O’Connell, Replication Data for: Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointees, 60 *Am. J. Pol. Sci.* 914 (2016) [hereinafter Krause & O’Connell, Replication Data], available at <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/E9UQ0S> (last visited July 3, 2017). Krause and O’Connell’s dataset reports whether each appointee “has [the] same or strongly presumed partisan affiliation as [the] appointing President.” See Codebook, Krause & O’Connell, Replication Data, available at <https://dataverse.harvard.edu/file.xhtml?fileId=2681274&version=1.2> (last visited July 3, 2017); see also George A. Krause & Anne Joseph O’Connell, Compliance, Competence, and Bureaucratic Leadership in the U.S. Federal Government Agencies, at 13–17 (Sept. 19, 2011) (unpublished manuscript) (describing the database).

⁹⁷ Congressional Research Service, Presidential Appointments to Full-Time Positions on Regulatory and Other Collegial Boards and Commissions (2001, 2003, 2005, 2007, 2009, 2011, 2013, and 2015 eds.), available at <https://www.everycrsreport.com> (last visited July 3, 2017). We excluded from our analysis the nine appointees whom the CRS Reports classified as “independent.”

Finally, we employ the Database on Ideology, Money in Politics, and Elections (DIME) to determine the ideological preferences of each appointee.⁹⁸ Developed by Adam Bonica, DIME contains over 130 million political contributions made by 14.7 million individuals and 1.7 million organizations to over 80,000 political action committees and candidates in federal, state, and local elections between 1979 and 2014.⁹⁹ DIME leverages these data to generate ideology-based scores, referred to as Campaign Finance Scores (CFscores), for all donors and recipients during this period.¹⁰⁰

The intuition behind DIME is simple: that individuals' decisions to contribute to political campaigns constitute revealed preferences concerning their political views.¹⁰¹ The destination and amount of an individual's campaign contributions disclose information regarding that individual's ideological "ideal point." DIME's algorithm uses this information on all of an individual's donations between 1979 and 2014 to place donors along a scale based on their history of campaign contributions.¹⁰² The scale ranges from -2 (assigned to the most liberal donors) to 2

⁹⁸ See Adam Bonica, Database on Ideology, Money in Politics, and Elections (DIME) (Aug. 16, 2016), available at <https://dataverse.harvard.edu/dataverse/dime> (last visited July 3, 2017).

⁹⁹ Adam Bonica, DIME Codebook, Database on Ideology, Money in Politics, and Elections (DIME) (Aug. 16, 2016), available at <https://dataverse.harvard.edu/file.xhtml?fileId=2865308&version=2.2> (last visited July 3, 2017) (providing statistics for the most recent update to DIME). Contribution data is derived from the Federal Election Commission and several good-government organizations. Adam Bonica, Mapping the Ideological Marketplace, 58 Am. J. Pol. Sci. 367, 370 (2014) [hereinafter Bonica, Ideological Marketplace].

¹⁰⁰ The use of spatial scores to measure the preferences of political actors is well-established in political science. See Bonica, Ideological Marketplace, *supra* note 99, at 368. Their application to legal scholarship has become increasingly common in recent years. See, e.g., Lee Epstein & Eric A. Posner, Supreme Court Justices' Loyalty to the President, 45 J. Legal Stud. 401 (2016); Nicholas Stephanopoulos, Spatial Diversity, 125 Harv. L. Rev. 1904 (2012).

In particular, DIME's CFscores have been employed or cited in a wide variety of social-scientific and legal scholarship since their debut in 2013. See, e.g., Adam Bonica, Adam Chilton, & Maya Sen, The Political Ideologies of American Lawyers, 8 J. Legal Analysis 277 (2016); Abby K. Wood & Douglas M. Spencer, In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns, 15 Election L.J. 302 (2016).

¹⁰¹ Bonica, Ideological Marketplace, *supra* note 99, at 367.

¹⁰² For a technical explanation of DIME's estimation strategic, see Bonica, Ideological Marketplace, *supra* note 99. Essentially, DIME places donors along a unidimensional scale so as to minimize the distance between donors with similar patterns of political giving. DIME then places recipients along a unidimensional scale so as to minimize the distance between recipients with similar donor pools. That some donors also are recipients provides a "bridge," enabling DIME to place donors and recipients on the *same* scale. Likewise, that some donors contribute to both state and federal campaigns and that some recipients run for both state and federal office provides additional bridge observations. These bridges enable DIME to create a single ideological scale for a massive number of individuals across 36 years of politics. See Adam Bonica & Michael J. Woodruff, A Common-Space Measure of State Supreme Court Ideology, 31 J.L. Econ. & Org. 472, 476--77 (2015). Bonica has subjected DIME to several tests to evaluate the validity of the measure. Concerning the measure's external validity, CFscores for members of Congress correlate closely with the scores assigned to these legislators by DW-NOMINATE, a well-established method of estimating legislators ideal points based on their roll-

(the most conservative donors).¹⁰³ The mean CFscore for donors is zero and the standard deviation is one.¹⁰⁴

To obtain each appointee's CFscore score, we searched the DIME project's dataset on appointees to federal agencies,¹⁰⁵ as well as the project's full database on all contributors to federal, state, and local elections between 1979 and 2014.¹⁰⁶ For individuals with common names or names with multiple entries in the full database, we cross-checked the individuals' profession, employer, and place of residence as reported in DIME with the appointee's biographical information available via online sources – e.g., biographical sketches on current employers' websites, LinkedIn profiles, obituaries, etc. – to determine whether the individual located in DIME and the appointee are the same person. This method yielded CFscores for 80% of appointees to the 23 PBR agencies whom we identified (578 of 722). This 80% match rate is comparable to the success rates of similar studies that employ DIME to determine the ideologies of members of other elite groups.¹⁰⁷

Readers may wonder whether campaign contributions truly capture donors' political preferences. Donors may instead choose to give for a range of strategic reasons—e.g., to encourage the election of politicians sympathetic to the donors' business interests, or to curry favor with existing officeholders in exchange for access, votes, or other services.¹⁰⁸ This critique may seem particularly powerful for our research design, given that all donors in our sample actually *did* receive

call voting records. See Bonica, Ideological Marketplace, *supra* note 99, at 370--71 (reporting that $r = 0.92$ for the bivariate correlation between these two estimates). Concerning internal validity, for individuals that are active donors or recipients throughout the 1979-2014 period, these individuals' static CFscores derived from their activity during the entire period are closely correlated with CFscores derived from these individuals' activity during select years within this range. See *id.* (reporting that $r = 0.97$ for the bivariate correlation between these two estimates).

¹⁰³ Bonica, Ideological Marketplace, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ Adam Bonica, Executive Appointees to Federal Agencies, Database on Ideology, Money in Politics, and Elections (DIME), available at <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/O5PX0B> (last visited July 3, 2017); see also Adam Bonica, Jowei Chen, and Tim Johnson, Senate Gate-Keeping, Presidential Staffing of "inferior Offices," and the Ideological Composition of Appointments to the Public Bureaucracy, 10 Q.J. Pol. Sci. 5 (2015).

¹⁰⁶ Adam Bonica, DIME Contributors, 1979-2014, Database on Ideology, Money in Politics, and Elections (DIME), available at <https://dataverse.harvard.edu/file.xhtml?fileId=2865300&version=2.2> (last visited July 3, 2017).

¹⁰⁷ See Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema, & Maya Sen, The Political Ideologies of Law Clerks, 19 Am. L. & Econ. Rev. 96, 105 (2017) (reporting a 66% match rate for former Supreme Court clerks); Bonica, Chen & Johnson, *supra* note 107, at 20 (72% match rate for a subset of appointees under Clinton and George W. Bush); Adam Bonica, Avenues of Influence: On the Political Expenditures of Corporations and their Directors and Executives, 18 Bus. & Pol. 367, 375 (2016) (83% match rate for Fortune 500 CEOs and board members).

¹⁰⁸ See Sanford C. Gordon, Catherine Hafer, and Dimitri Landa, Consumption or Investment? On Motivations for Political Giving, 69 J. Pol. 1057, 1058 (2007) (describing donors' varied potential motives).

something of value—an executive appointment—at some point during the 36-year period in which they made at least one campaign contribution. Our response to this concern is twofold. First, we rely on a large body of political science research finding that individuals make political contributions sincerely—not strategically.¹⁰⁹ Survey results indicate that donors consider the recipient’s ideology to be the most important factor when deciding whether to give, placing ideology far above more strategic considerations such as electability, incumbent status, and ability to influence the candidate.¹¹⁰ Accordingly, the dominant view among political scientists considers campaign contributions as a form of consumption among “political hobbyists,” rather than an investment by strategic actors.¹¹¹ Second, insofar as a divergence between donors’ ideological preferences and the ideal points reflected by their campaign contributions introduces measurement error into our analysis, we find it hard to explain why such a divergence would account for the change over time that we document in the next Section. (Below we consider whether the easy observability of campaign contributions in the Internet age might affect our results, and we find strong evidence that it does not.¹¹²)

B. Results

1. Descriptive Statistics

With these data on appointee ideology and partisan identification in hand, we turn to analyzing the effects of PBRs on the composition of agency leadership ranks. Table 2 provides an overview of the appointees included in our data: 578 appointees to 23 agencies over 36 years.

¹⁰⁹ See, e.g., Bonica, *Ideological Marketplace*, at 370; Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 *Pub. Choice* 221 (2009); Nolan McCarty & Lawrence S. Rothenberg, *Commitment and the Campaign Contribution Contract*, 40 *Am. J. Pol. Sci.* 872 (1996).

¹¹⁰ See Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 *Pol. Research Q.* 148, 154 & tbl.1 (2016).

¹¹¹ See Eitan Hersh, *Political Hobbyism: A Theory of Mass Politics*, (Mar. 17, 2017) (unpublished manuscript), available at http://www.eitanhersh.com/uploads/7/9/7/5/7975685/hersh_theory_of_hobbyism_v2.0.pdf (last visited July 3, 2017); accord Stephen Ansolabehere, John M. de Figueiredo, & James M. Snyder, *Why Is There So Little Money in U.S. Politics?*, 17 *J. Econ. Perspectives* 105 (2003).

¹¹² See *infra* notes 163-165 and accompanying text.

Table 2: Coverage: Appointees by President

<i>Appointing President</i>	<i>Co-Party Appointees</i>		<i>Cross-Party Appointees</i>	
	<i>Total Appts.</i>	<i>Appts. Per Year</i>	<i>Total Appts.</i>	<i>Appts. Per Year</i>
All (1979-2014)	362	6.6	216	4.0
Democratic Presidents	155	5.9	96	3.8
Republican Presidents	207	7.2	120	4.3
Carter	11	5.5	9	4.5
Reagan	56	7.0	38	4.8
G.H.W. Bush	39	9.75	17	4.3
Clinton	75	9.4	48	6.0
G.W. Bush	112	14.0	65	8.2
Obama	69	11.5	39	6.5

n = 578. Includes appointees to 23 agencies during the 1979-2014 period. Carter years include 1979-1980 only; Obama years include 2009-2014 only.

Unsurprisingly, all Presidents during this period tended to appoint their fellow party members to PBR agencies; 362 of the 578, or 63 percent, of appointees belonged to the same party as the appointing President.¹¹³ This tilt is not the result of Presidents disregarding PBR statutes.¹¹⁴ Instead, it is possible because most partisan balance statutes do not require perfect balance, and instead permit a bare majority of

¹¹³ Interestingly, the proportion of appointees that share the President's party label almost perfectly mirrors the no-more-than-three-of-five requirement that is typical among independent agencies. See Datla & Revesz, *supra* note 1, at 776.

¹¹⁴ The imbalance is greatest during the presidency of George H.W. Bush, who is not known for his sharp partisan elbows. See Jon Meacham, *Destiny and Power: The American Odyssey of George Herbert Walker Bush* 390 (2015).

members to be affiliated with the same political party.¹¹⁵ The possibility that co-partisan appointees strategically retire before the end of their terms when a friendly President is in office (leading to more openings for co-party slots during any given presidency) also may contribute to the imbalance.¹¹⁶ Table 3 contains descriptive statistics concerning the ideologies of appointees to PBR agencies, arranged by President and by whether the appointee and appointing President shared a partisan affiliation. For each President, Table 3 also reports differences in the mean ideology of co-party versus cross-party appointees.¹¹⁷

¹¹⁵ See, e.g., 15 U.S.C. 2053(c) (mandating that no than three out of the five CPSC commissioners be affiliated with the same party); 15 U.S.C. 78d(a) (same requirement for the SEC); but see, e.g., 52 U.S.C. 30106(a)(1) (requiring exact partisan balance on the FEC).

¹¹⁶ Cf. Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 37 (2005) (summarizing studies showing that appellate judges strategically time their retirements to increase the likelihood that likeminded successors will replace them).

Note that the number of appointees per year who appear in DIME is somewhat lower for the Carter and Reagan administrations than for later presidencies. We attribute this trend to three factors. First, public disclosure of federal campaign contributions did not begin until 1972, and DIME's coverage starts in 1979. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 304, 86 Stat. 3, 14-15 (1972) (codified as amended at 52 U.S.C. § 30104). Thus, Carter and Reagan appointees who made their last campaign contributions before the late 1970s will generally not appear in DIME. Second, the \$200 reporting threshold has not changed since 1980, despite intervening inflation. See Federal Election Campaign Act Amendments of 1979, § 103, 93 Stat. 1339, 1352 (1980) (codified as amended at 52 U.S.C. § 30104). Individuals who made campaign contributions in more recent years thus are more likely to exceed the threshold and trigger a public disclosure. Finally, one agency was established partway through the 1979-2014 period, resulting in a small increase in the number of positions to be filled. See National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 1441(a), 102 Stat. 1918, 2076 (1988) (codified as amended at 42 U.S.C. § 2286) (establishing Defense Nuclear Facilities Safety Board). Excluding the Defense Nuclear Facilities Safety Board from the analysis does not materially alter any of our results.

¹¹⁷ The final column in Table 3 reports the p value for a series of two-sample Kolmogorov-Smirnov (KS) tests for differences in distributions. Low p values counsel in favor of rejecting the null hypothesis that the distribution of CFscores for co-party appointees and the distribution of CFscores for cross-party appointees were drawn from the same underlying distribution. All of the reported p values meet – and, for all but the Carter appointees, far exceed – the conventionally accepted $p < 0.05$ threshold for statistical significance.

Table 3: Appointee Ideology, by President

<u>Appointing President</u>	<i>Mean CFscore</i> <i>(Standard Deviation)</i>		<i>/ Diff. in Means </i> ¹¹⁸ <i>(95% Conf. Interval)</i>	<i>KS Test p-</i> <i>value</i>
	<u>Co-Party Appointees</u>	<u>Cross-Party Appointees</u>		
Democratic Presidents	-0.913 (0.521)	0.774 (0.535)	1.687 (1.549, 1.826)	0.000
Republican Presidents	0.848 (0.368)	-0.492 (0.808)	1.340 (1.182, 1.497)	0.000
Carter	-0.494 (0.749)	0.301 (0.828)	0.795 (0.011, 1.601)	0.047
Reagan	0.797 (0.539)	-0.005 (0.794)	0.802 (0.496, 1.108)	0.000
G.H.W. Bush	0.846 (0.422)	-0.162 (0.900)	1.008 (0.497, 1.520)	0.000
Clinton	-0.875 (0.408)	0.747 (0.494)	1.622 (1.447, 1.798)	0.000
G.W. Bush	0.873 (0.213)	-0.830 (0.615)	1.703 (1.546, 1.861)	0.000
Obama	-1.015 (0.563)	0.902 (0.458)	1.917 (1.719, 2.116)	0.000

n = 578. Includes appointees to 23 agencies during the 1979-2014 period. Absolute values of differences in means between co-party and cross-party appointees reported. Differences in means calculated via Welch's t-tests, appropriate for samples with skewed distributions drawn from independent populations. Carter years include 1979-1980 only; Obama years include 2009-2014 only. During the entire 1979-2014 period, the mean CFscore for all appointees was 0.078 (sd=0.961).

The key takeaway from Table 3 emerges from the column displaying the difference in means between co-party and cross-party appointees. During the Carter administration, the point estimate for the ideological gap between co-party and cross-party appointees to PBR agencies is 0.795, which indicates a modest ideological

¹¹⁸ Difference in means refers to the absolute value of the difference in mean CFscore for co-party appointees and mean CFscore for cross-party appointees.

difference (less than one standard deviation) between Carter's co-party and cross-party appointees.¹¹⁹ This gap grows steadily in subsequent administrations, reaching 1.917 in the Obama years—almost two-and-one-half times the size of the gap under Carter. The widening occurs over Democratic as well as Republican administrations. Accordingly, at first glance the most notable aspect of this difference is its growth over time, rather than its association with any particular party or presidency.

2. Co-Party vs. Cross-Party Appointees

What do the ideologies of appointees to PBR agencies look like? More specifically, how do the views of individuals appointed to Democratic seats by Democratic President differ from those appointed to Democratic seats by Republican Presidents? And are the patterns similar for Republican appointees?

To answer these questions, Figure 3 compares the ideological distributions of all four categories of nominees. Democratic officials appointed by Democratic Presidents appear in dark blue, whereas Democrats appointed by Republicans appear in light blue; likewise, Republicans appointed by Republicans appear in dark red, whereas Republicans appointed by Democrats appear in light red. Because, for this analysis, we are interested in *recent* appointment behavior, the figure is limited to the 2000-2014 period.

¹¹⁹ See Bonica, Ideological Marketplace, *supra* note 99 (stating that the mean CFscore for donors is zero and the standard deviation is one).

Figure 3: Ideologies of Appointees to PBR Agencies, 2000-2014

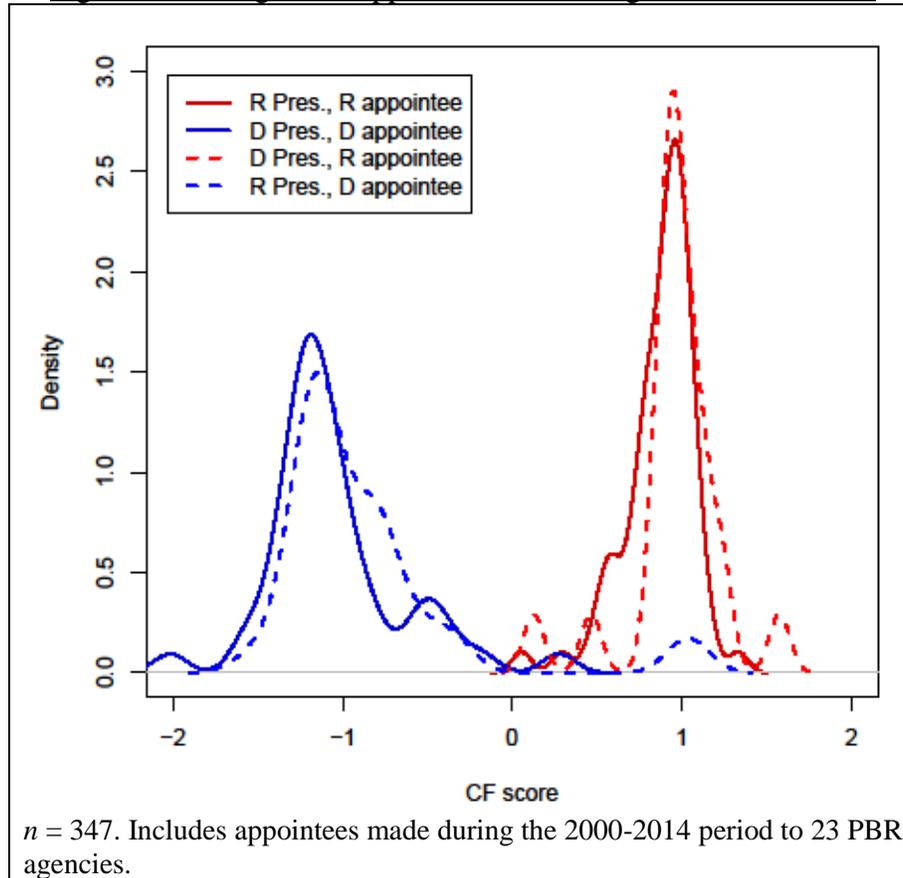
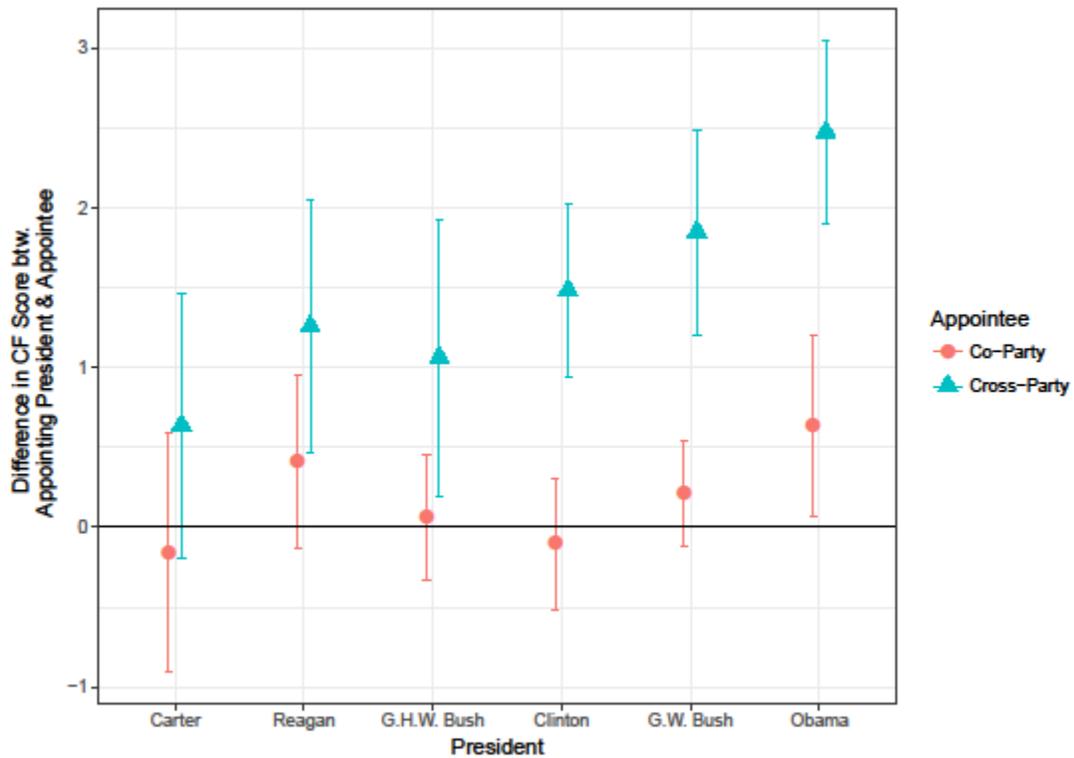


Figure 3 reveals a striking feature of recent appointments to PBR agencies: in expectation, Democrats appointed by Democratic Presidents have views virtually identical to those of Democrats appointed by Republican Presidents, and the same holds true of Republican appointees. Presidents Clinton and Obama did not name liberal Republicans to cross-party positions on PBR agencies; neither did President George W. Bush appoint conservative Democrats to cross-party seats. Instead, recent Presidents abided by the spirit of PBRs in agencies' organic statutes.

Presidents' willingness to appoint their ideological opponents to cross-party seats appears to be a recent development. The following several figures compare the ideologies of co-party and cross-party appointees beginning in 1979. Figure 4(a) displays the ideological distance between the CFscore of the appointing President and the mean CFscore of that President's appointees to PBR agencies. For a Democratic President, a negative value indicates that the mean appointee is more liberal than the appointing President, and a positive value indicates that the mean appointee is more conservative. For a Republican President, the reverse is the case: negative values indicate that the mean appointee is more conservative than the

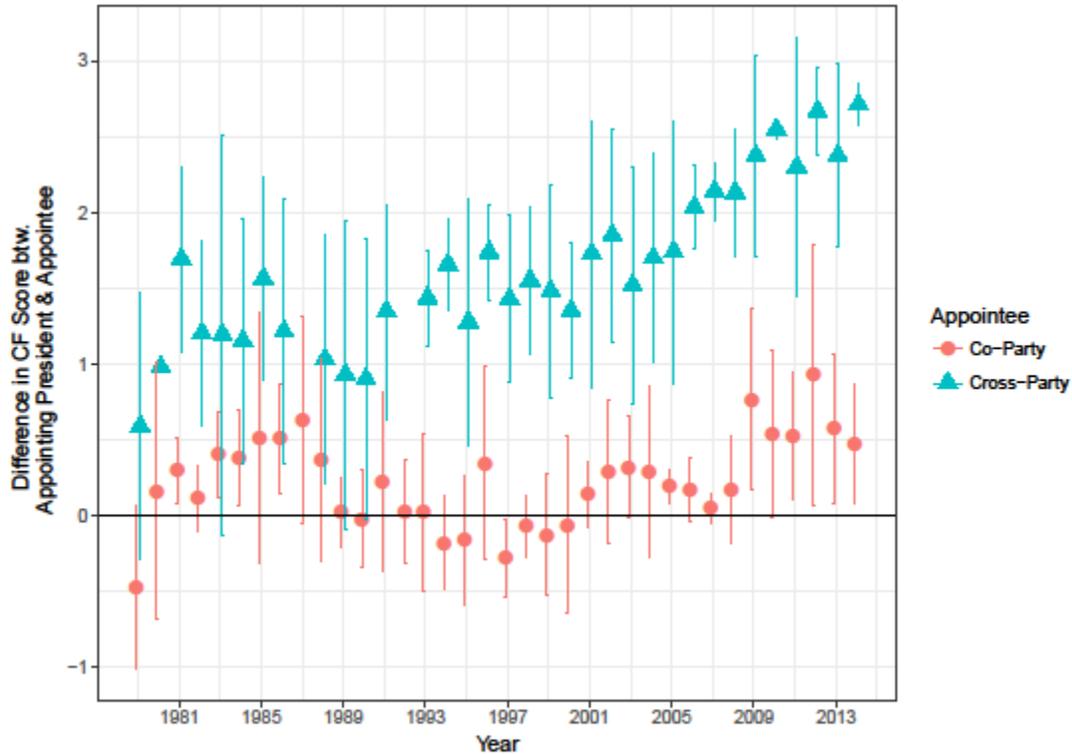
appointing President, and positive values indicate that the appointee is more liberal. Figure 4(b) reports similar information by year. The bars emanating from the point estimates in both figures denote one standard deviation in each direction from the relevant mean.

Figure 4(a): Ideological Distance Between Appointees to PBR Agencies and Their Appointing Presidents



$n = 578$. Point estimates, denoted as solid shapes, signify mean distance between appointees' CFscore and appointing President's CFscore. Positive values for appointees in a Democratic (Republican) administration signify that the mean appointee is more conservative (liberal) than the appointing President. Vertical bars extend one standard deviation above and below the mean. The appointing President's CFscore is standardized to $y = 0$. Carter years include 1979-1980 only; Obama years include 2009-2014 only.

Figure 4(b): Ideological Distance Between Appointees to PBR Agencies and Their Appointing Presidents, by Year



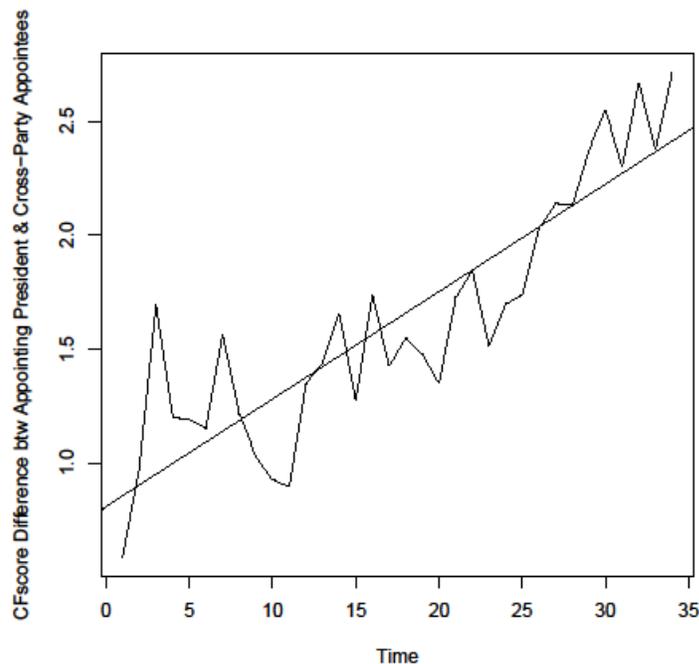
$n = 578$. Point estimates, denoted as solid shapes, signify mean distance between appointees' CFscore and appointing President's CFscore. Positive values for appointees in a Democratic (Republican) administration signify that the mean appointee is more conservative (liberal) than the appointing President. Vertical bars extend one standard deviation above and below the mean. The appointing President's CFscore is standardized to $y = 0$.

The point estimates for Figures 4(a) and 4(b) show that cross-party appointees are more conservative than co-party appointees across all Democratic administrations and more liberal than co-party appointees in all Republican administrations. This gap increases, in fits and spurts, throughout the period of study. During the Carter administration, for instance, the CFscore for the mean appointee to a Democratic seat was 0.159 points to the left of President Carter's CFscore, whereas the mean appointee to a Republican seat had a CFscore that was 0.636 points to the right of President Carter—a gap of 0.795 points. By the Obama administration, the mean Democratic appointee was 0.637 points to the *right* of President Obama, while the mean Republican appointee was 2.471 points to the right of the President—a gap of 1.834 points. In other words, the ideological gap between co-party and cross-party appointees within the same administration widened over time.

The associated standard deviations in both figures provide further support this finding. In Figure 4(a), the standard deviation bars for co-party and cross-party appointees overlap during the Carter, Reagan and George H.W. Bush administrations, indicating that a sizable number of co-party and cross-party appointees are ideologically similar. The bars then pull apart in the Clinton, George W. Bush, and Obama years, signifying significantly less ideological overlap between co-party and cross-party appointees during these presidencies. The standard deviation bars in Figure 4(b) tell a similar story.

A time trend appears to be present in Figures 4(a) and 4(b), with the ideological distance between cross-party appointees and their appointing President increasing over time. Figure 5, below, provides a better sense of this time trend. The figure plots the difference in ideological score between the President and cross-party appointees over the 36-year study period and includes a linear regression line. The positive slope suggests the presence of a trend component.

Figure 5: Time Trend in Ideological Distance Between the President and Cross-Party Appointees



The supply-side theory suggests that we should observe steady growth in the ideological gap between cross-party appointees and their appointing President over

time, consistent with the pattern of partisan sort shown in Figure 2. By contrast, the supply-side theory gives us no reason to expect any similar changes over time in the gap between co-party appointees and their appointing President. None of the six Presidents in our study period (Carter through Obama) exhibited ideological preferences that were radically out of step with the mainstream of his own party, and so we would expect each of these Presidents to be able to find co-partisans whose views roughly matched his own. Visually, Figures 4 and 5 align with the supply-side theory's predictions: cross-party appointees have grown further apart from the appointing President, while co-party appointees have not.

3. Ideological Consistency

Our analysis thus far treats appointees' ideologies as time-invariant. The DIME master database assigns each donor a single CFscore based on that individual's total contributions during the 1979-2014 period, and we adopt this measure as a proxy for ideology in the analysis above. Yet we are mindful that individuals may evolve in their thinking, or that they may donate strategically prior to their appointment so as to send a signal of ideology that differs from their true preferences. Fortunately, the available data allow us to observe whether donation patterns change post-appointment in ways that would suggest either ideological drift or strategic giving.

Although ideological self-categorization is stable for most people throughout their lives,¹²⁰ members of the political class from which appointees are drawn may be less consistent. The notion that elite actors display ideological fluidity over their careers is familiar to students of judicial behavior. Observers of the Supreme Court have pointed to a so-called "Greenhouse effect"—a trend of Supreme Court Justices "drift[ing] away from the conservatism of their early votes" and towards the more liberal preferences of "cultural elites."¹²¹ While the Greenhouse effect generally refers to the evolution of appointees' sincere preferences over time, a related possibility is that prospective appointees may misrepresent their preferences prior to

¹²⁰ Donald Green, Bradley Palmquist, & Eric Schickler, *Partisan Hearts & Minds* 28 (2004).

¹²¹ See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515, 1518 (2010). The "Greenhouse" in question is Linda Greenhouse, the longtime Supreme Court correspondent for the *New York Times*. The term can be traced back to a 1992 speech by Judge Laurence Silberman, a Reagan appointee to the U.S. Court of Appeals for the D.C. Circuit, who claimed that Greenhouse's reporting pressured Justices to take more liberal stances in order to garner favorable coverage from the *Times*. See Martin Tolchin, *Press Is Condemned by a Federal Judge for Court Coverage*, *N.Y. Times* (June 15, 1992), <http://www.nytimes.com/1992/06/15/us/press-is-condemned-by-a-federal-judge-for-court-coverage.html>.

confirmation and then reveal their true selves after they are sworn in.¹²² For example, a Democratic President may “sell” a nominee to the Senate as a genuine Republican, but the individual may turn out to be—after confirmation—a liberal who registered as a Republican and donated to conservative candidates for the purpose of positioning himself for a potential cross-party appointment. To return to our market metaphor, a potential appointee who looks like a peach from the opposition party’s perspective may turn out to be a lemon—and consumers (here, senators) have incomplete information regarding which nominees fall into which of these categories until after the transaction.

To test the ideological consistency of appointees over time, we examined the donation patterns of commissioners in the eight years before and after their initial appointment. We looked at commissioners’ cycle-specific scores derived from the biennial DIME contribution datasets, which include CFscores for donors in each two-year election cycle.¹²³ Naturally, these files are less comprehensive than the 1979-2014 DIME master database; to be included in one of the election cycle-specific files, an individual must donate to a sufficient number of candidates or PACs to generate a CFscore for that cycle.

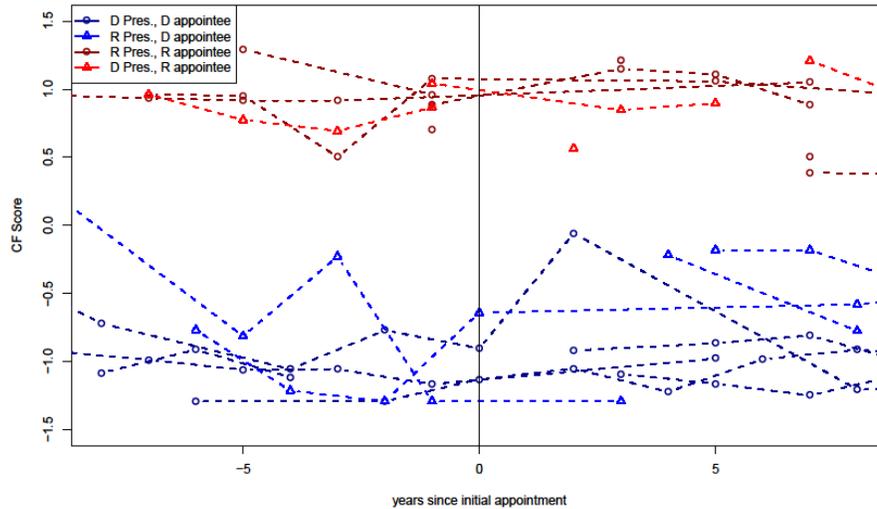
Creating cycle-specific scores enables us to chart commissioners’ ideal point estimates over time and identify any changes in behavior around the time of their initial appointments. Here, we display results for the FCC, which in several respects is the archetypical agency with a PBR; the FCC has the modal number of commissioners (five), the modal term length (five years), and, like many of the 23 agencies in our study, was created during the New Deal era.

Figure 6 displays our results for both Democratic and Republican appointees selected by both Democratic and Republican presidents. To compare commissioners’ ideal point estimates before and after appointment, the *x* axis in both figures denotes the number of years since each commissioner was first appointed to the FCC (negative numbers thus represent pre-appointment years).

¹²² On “stealth nominees” at the Supreme Court, see Michael Comiskey, *The Supreme Court Appointment Process: Lessons from Filling the Rehnquist and O’Connor Vacancies*, 41 *PS: Pol. Sci. & Pol.* 355, 357 (2008).

¹²³ We thank Adam Bonica and Kyle Rozema for their assistance in this analysis.

Figure 6: Longitudinal Change in FCC Commissioners' Ideal Point Estimates



If liberals registered as Republicans and donated to conservative candidates so that they could be sold by a Democratic President to Senate Republicans as genuine cross-party appointees, then we would expect to see the light red line (Democratic President, Republican appointee) trending downwards in later years, as appointees who posed as conservatives pre-confirmation revealed their true liberal selves. Likewise, if conservatives registered as Democrats and donated to liberal candidates so that they could be sold by a Republican President to Senate Democrats, then we would expect to see the light blue line (Republican President, Democratic appointee) trending upwards in later years, as appointees who posed as liberals revealed their true conservative selves. And if appointees tended to drift in a single direction (i.e., a Greenhouse effect at multimember agencies), then we would expect the lines to be roughly parallel with similar slopes.

We observe none of these phenomena in Figure 6. For the most part, commissioners display consistent ideologies over time. Concerning those commissioners for whom we have ideal point estimates both before and after their initial appointments, we see only slight, inconsistent movement towards more extreme positions post-appointment.

4. PBR Agencies vs. the Rest of the Executive Branch

To provide broader context for this secular divergence in the ideological composition of PBR agencies, we compare ideological preferences of appointees to PBR agencies with the ideological preferences of other high-level executive branch

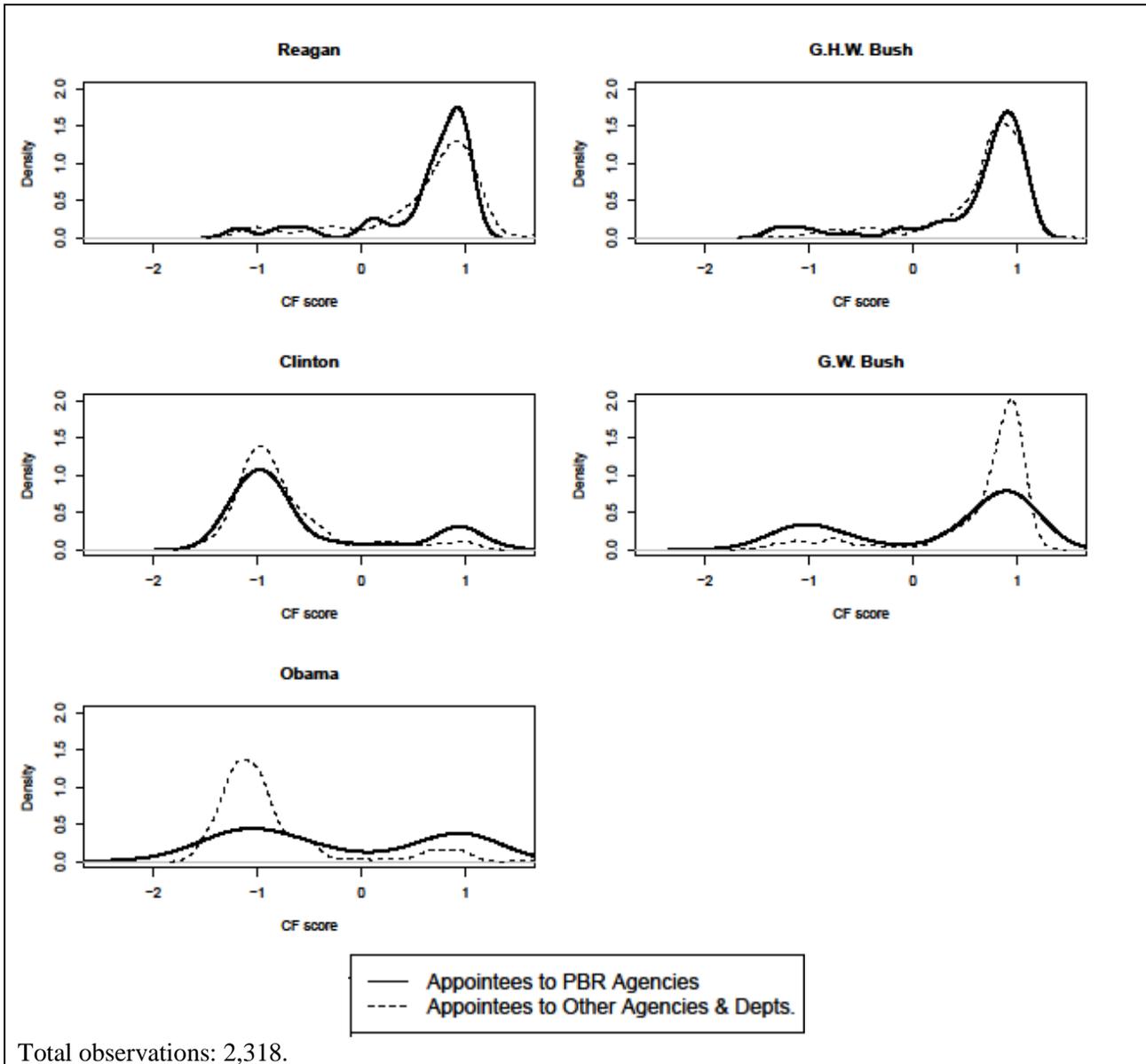
policymakers.¹²⁴ Placing PBR agency appointees and other officeholders on the same scale allows us to assess the extent to which the observed trend in PBR agencies reflects or departs from changes in the ideological composition of executive appointees writ large.

For this analysis, we leverage a dataset created by Adam Bonica, Jowei Chen, and Tim Johnson, which contains DIME-based CFscores scores for all available executive appointees between the Reagan and Obama administrations.¹²⁵ The solid curves in Figures 7(a)-(f) depict the ideological distributions of PBR appointees across five Presidential administrations; the dashed curves depict these distributions for other high-level, Senate-confirmed officials.

¹²⁴ High-level officials encompass heads and commissioners of other independent agencies, department secretaries, and second- and third-level leaders (typically deputy secretaries and assistant secretaries or undersecretaries) in executive departments. All positions require Senate confirmation.

¹²⁵ Adam Bonica, Executive Appointees to Federal Agencies, Database on Ideology, Money in Politics, and Elections (DIME) (Aug. 16, 2016), *available at* <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/O5PX0B> (last visited July 3, 2017); see also Adam Bonica, Jowei Chen, & Tim Johnson, *supra* note 107, at 5 (2015). To allow for longitudinal comparisons across the entire period, we exclude agencies that operated during only part of this period, e.g., the African Development Foundation, Corporation for National and Community Service, Federal Hospital Insurance Trust Fund, and U.S. Information Agency.

Figures 7(a)-(e): Ideological Distributions of Appointees to PBR Agencies and Other Agencies



Figures 7(a) through 7(e) show a remarkable development. Figure 7(a) reports that during the Reagan administration, the ideological distribution of appointees to PBR agencies—including both co-party and cross-party appointees—maps closely onto the ideological distribution of high-level executive appointees. Both distributions are unimodal, clustered around a conservative President’s own CFscore. Figure 7(b) provides a similar picture for the George H.W. Bush administration.

A change, however, is discernible in the Clinton years. Although most Clinton appointees to both PBR agencies and other high-level executive positions are clustered around the same left-of-center mode, a right-of-center local maximum has begun to develop—but only for appointees to PBR agencies. This bimodality becomes more pronounced in the George W. Bush administration (naturally, with the locations of the global and local maxima flipping, as the White House switches from Democratic to Republican control). The trend continues in the Obama administration; by the Obama years, the distribution of appointees to PBR agencies is almost completely bimodal, with a cluster of appointees located approximately at -1 and a second cluster—only slightly smaller—roughly centered around $+1$. By contrast, the distribution of other high-level appointees remains single-peaked, with its mode located near the President’s CFscore.

To translate these trends from picture to prose: Our findings suggest that PBRs had very little effect on the ideological composition of agencies during the Reagan and George H.W. Bush administrations. The ideological distribution of PBR agency appointees closely matches the distribution of appointees to positions not covered by PBRs. Starting with the Clinton administration, however, we begin to see a distinct PBR effect. President Clinton appointed a fair number of conservatives to PBR agencies but named very few conservatives to other posts. The PBR effect grows even more pronounced under President George W. Bush and President Obama. These results confirm our thesis that PBRs do indeed bite, but that they have come to bite only relatively recently.

5. Statutory vs. Informal PBRs

Our analysis thus far has lumped the National Labor Relations Board with other PBR agencies, even though the National Labor Relations Board is not subject to a formal PBR. The House in 1947 passed legislation that would have added a formal partisan balance requirement to the statute governing NLRB membership, but the party balance provision was (for reasons not explained in the legislative history¹²⁶) omitted from the version of the bill that passed the Senate and became law.¹²⁷ Nonetheless, there has been a “tradition” since the Eisenhower years that

¹²⁶ H.R. Rep. No. 510, 80th Cong., 1st Sess. 36--37 (1947) (noting that party balance provision was included in House bill but not in conference agreement, and offering no explanation for omission).

¹²⁷ See Labor Management Relations Act, Pub. L. No. 80-101, § 101, 61 Stat. 136, 139 (1947).

Presidents have filled no more than three of the NLRB's five seats with members of their own party.¹²⁸ The informal partisan balance requirement at the NLRB is an example of what Adrian Vermeule has called a "convention of agency independence": an unwritten norm that has come to govern the behavior of political actors with respect to the agency.¹²⁹

The case of the NLRB allows us to examine whether a partisan balance requirement that emerges from convention has the same effect on ideological composition as a PBR set forth by statute. Table 4 compares the ideologies of appointees to the NLRB and the 22 agencies with statutory PBRs for which we have obtained data covering the 1979-2014 period. Under Democratic Presidents, cross-party appointees to the NLRB appear, on average, to be slightly less conservative than cross-party appointees to agencies with statutory partisan balance requirements, but this difference falls far short of statistical significance ($p = 0.945$). Likewise, under Republican Presidents, cross-party appointees to the NLRB appear on average to be slightly less liberal than cross-party appointees to agencies with statutory PBRs, but again, this difference is not statistically significant ($p = 0.849$). In short, we find little to suggest that the difference between the NLRB's partisan balance convention and the statutory PBRs applicable to other agencies has any effect on ideological composition—the NLRB looks much like the statutory PBR agencies in terms of the ideological preferences of appointees.

Table 4: Mean Ideology of Appointees to NLRB and Statutory PBR Agencies

	NLRB		Statutory PBR Agencies	
	Co-Party Appointees	Cross Party Appointees	Co-Party Appointees	Cross Party Appointees
Democratic Presidents	-1.106 (0.309)	0.753 (0.774)	-0.898 (0.531)	0.776 (0.520)
Republican Presidents	0.681 (0.760)	-0.341 (1.052)	0.863 (0.309)	-0.500 (0.797)
<i>n</i> = 578. Includes appointments made to the NLRB and 22 other agencies during the 1979-2014 period. Cells report mean CFscores and, in parentheses, standard deviations.				

¹²⁸ Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 *J. Labor Res.* 699, 700 (2001); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 *Comp. Labor Law & Pol'y J.* 221, 244 & n. 109 (2005). The last time that the NLRB had more than three members from the same party was August 1956, when four Republicans and one Democrat served on the board. President Eisenhower then named a Democrat to replace a retiring Republican. See *Members of the NLRB Since 1935*, Nat'l Labor Relations Bd., <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited July 16, 2017).

¹²⁹ See Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* 1163 (2013).

Indeed, when we focus on 21st century appointments, we find evidence that the partisan balance convention at the NLRB has as much if not more “bite” than statutory PBRs elsewhere. Since 2000, Republicans appointed by Democratic Presidents to the NLRB have been, on average, even more conservative—and Democrats appointed by Republican Presidents to the NLRB even more liberal—than those Presidents’ cross-party appointees to agencies with statutory PBRs.¹³⁰ This conclusion, however, comes with an important caveat. Our dataset includes CFscores for only six cross-party appointees—three Democrats appointed by President George W. Bush and three Republicans appointed by President Clinton or Obama—during the 2000-2014 period. This relative lack of data on cross-party appointees to the NLRB may not be coincidental. The Board has suffered from persistent, politically motivated vacancies during the past several administrations.¹³¹ Whereas Congress permits appointees to other agencies to serve beyond the expiration of their terms until their successors are confirmed,¹³² NLRB members are not authorized to serve in an acting capacity.¹³³ That NLRB seats remain vacant until filled may provide senators with an additional incentive to delay acting on nominations to the Board (beyond their usual incentives to do so for agencies where such delay leaves the existing appointees temporarily in place). Accordingly, it is possible that partisan gamesmanship is occurring with respect to cross-party appointees to the NLRB—it just occurs at an earlier stage in the appointments process and thus is not captured by the CFscores for those individuals that make it onto the Board.

In sum, the partisan balance norm that exists by “convention” or “tradition” at the NLRB appears to be driving a gap between co-party and cross-party appointees that is broadly similar to the gap between co-party and cross-party appointees at agencies with statutory PBRs. The bite of partisan balance

¹³⁰ Further, the results when the analysis is limited to 2000-2014 also lend support to the conventional wisdom that the NLRB is an unusually politicized agency. See Brudney, *supra* note 128, at 223--24; Samuel Estreicher, ‘Depoliticizing’ the National Labor Relations Board: Administrative Steps, 64 Emory L.J. 1611, 1613 (2015); Julius G. Getman, The NLRB: What Went Wrong and Should We Try To Fix It?, 64 Emory L.J. 1495, 1496 (2015). For each President/appointee combination, the mean NLRB appointee is more extreme than the corresponding cell in the table for the other agencies with PBRs.

¹³¹ See Mark Landler and Steven Greenhouse, Vacancies and Partisan Fighting Put Labor Relations Agency in Legal Limbo, N.Y. Times (July 15, 2013).

¹³² See, e.g., 7 U.S.C. § 2(a)(2)(A) (providing that CFTC commissioners “shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office”); 15 U.S.C. § 78d(a) (similar provision regarding the SEC); 42 U.S.C. § 7171(b)(1) (FERC); 47 U.S.C. § 154(c) (FCC).

¹³³ See 5 U.S.C. §§ 3349b, 3349c(1)(A) (appointees to multi-member independent agencies cannot serve in a holdover or acting position unless otherwise statutorily authorized); 29 U.S.C. § 153(a) (no provision in NLRB organic statute for continuation of service beyond length of fixed term).

requirements does not appear to depend on whether these provisions are written into law. But whether we are dealing with a statutory PBR or a PBR that arises from convention, the puzzle remains as to why these requirements do anything at all to shape the ideological composition of multimember agencies. The next section turns to that question and to the implications of our results for various theories of PBRs' efficacy.

C. *Market Forces and Appointee Selection*

This Section reevaluates our two main causal explanations for the efficacy of PBRs—the supply-side theory and the demand-side theory—in light of our empirical analysis. We also consider (and largely reject) alternative hypotheses that might account for the topline results and time trends observed above.

1. Supply-Side Constraints

Our results are broadly consistent with the supply-side theory, which holds that Presidents are constrained in their selection by the ideological composition of the pool of potential cross-party appointees. As the political class from which the memberships of boards and commissions are typically drawn becomes more ideologically polarized along party lines, it becomes increasingly difficult for a President to identify competent individuals whose ideological preferences track the President's own but whose party affiliation does not. Presidents are reactive in this narrative; they appoint bona fide cross-party members because these are the only competent potential appointees that “the market” supplies.

The time trends in Figures 4(a) and 4(b) supports this theory. The appointment of bona fide cross-party members gradually becomes more prevalent from the late 1970s through the mid-2010s, while simultaneously, the political classes gradually became more ideologically distinct along party lines. While it might seem surprising that a motivated Democratic President cannot find a liberal Republican for a cross-party seat or that a motivated Republican President cannot find a conservative Democrat, the supply-side theory becomes more plausible if one supposes that Presidents care about competence as well as ideological alignment. To be sure, a Democratic President might still be able to find *someone* in a nation of more than 300 million people who shares the President's liberal views but registers as an independent or a Republican, and a Republican President might still be able to find *someone* who shares that President's conservative views but registers as an independent or a Democrat. Yet while we observe past Presidents drawing cross-party appointees from the pools of liberal Republicans and conservative Democrats when these pools were much larger, we see relatively few cross-party appointments of these types in recent years.

2. Demand-Side Constraints

The demand-side theory, by contrast, finds much weaker support here. Recall that this theory views senators as the “consumers” in the confirmation market to whom the President must “sell” his or her favored nominees. One could imagine that Democratic Presidents may want to appoint liberal Republicans to Republican-designated seats and that Republican Presidents may have the inverse desire, but that opposition-party senators use their advice-and-consent authority to block the appointments of moderates to party-specific seats. The demand-side theory therefore holds that the presence of bona fide cross-party commissioners on PBR agencies is attributable to pressure from cross-party senators.

If this narrative is accurate, one would expect Presidents to appoint genuine cross-partisans to cross-party seats only when cross-party senators are sufficiently powerful to compel Presidents to do so. By contrast, when cross-party senators do not have enough votes to block a party-member-in-name-only nominee, Presidents will have free rein to appoint milquetoast partisans to cross-party seats. Essentially, one would expect the ideological distance between appointing Presidents and cross-party appointees to be positively correlated with cross-party senators’ power to deny confirmation to disfavored nominees.

When do cross-party senators have the power to deny confirmation? One possibility is that the ability to block cloture—and thus deny a vote on a nominee—provides cross-party senators with a means of ensuring that the President appoints bona fide cross-party members to PBR agencies. This explanation, however, cannot explain the time trend in Figures 4(a) and 4(b), i.e., that partisan balance requirements have come to exert stronger effects over time. During virtually the entire study period, both parties held a sufficient number of seats to block a nominee under Senate filibuster rules.¹³⁴ Yet, as Figures 4(a) and 4(b) show, cross-party appointees did not become ideologically distinct, at conventionally accepted levels of statistical significance, until late in the period.

Further, a recent change in Senate rules allows for a simple test of the Senate’s potential role in giving PBRs their bite—and the results suggest that role is limited. On November 21, 2013, the leadership of the Senate Democratic majority

¹³⁴ For almost the entire 1979-2014 period, confirmation of executive-branch nominees required the assent of 60 senators, which is the number needed to invoke cloture under Senate Rule XXII. *See* Senate Rule XXII, §2 (providing that three-fifths of senators are required to invoke cloture, i.e., to vote to limit further consideration of a pending question, thereby permitting the question to be put to a majority vote). On November 21, 2013, the Senate re-interpreted Rule XXII to allow 51 votes to invoke cloture for nominees to positions other than the Supreme Court. Accordingly, a *unified* opposition party holding at least 41 Senate seats prior to that date, or 51 seats thereafter, could block a nominee. *See* Walter Oleszek, Changing the Senate Cloture Rule at the Start of a New Congress, CRS Rep. for Congress (Dec. 12, 2016), *available at* <https://fas.org/sgp/crs/misc/R44709.pdf> (last visited July 3, 2017). This new interpretation applies only if the vote occurs pursuant to a specific procedural posture. *Id.* The opposition party needs 51 votes, rather than 50, to block a nominee after November 21, 2013, because, in the event of a 50-50 tie, the Vice President would vote for confirmation.

exercised the “nuclear option” and altered the chamber’s interpretation of Senate Rule XXII to reduce the number of votes needed to invoke cloture for nominees to positions other than Supreme Court justiceships from 60 to 51 (or 50, with the Vice President as a tiebreaker).¹³⁵ For only the second time during the study period, a unified cross-party (here, the Republicans) did not possess sufficient votes to prevent a Senate majority from invoking cloture on a confirmation vote for a nominee to a PBR agency. A Senate-focused theory of PBRs’ bite would predict that President Obama’s appointees to cross-party seats would tend to be more liberal after November 21, 2013. In reality, however, appointees to cross-party PBR seats in the 12 months after this date are 0.179 points more *conservative* than appointees to cross-party PBR seats in the prior 12 months—a difference that is in line with the long-term year-to-year increases in ideological distance between the President and cross-party appointees displayed in Figure 4(b).

The other period in which a unified cross-party (again, the Republicans) did not possess sufficient votes to block a Senate majority from invoking closure was July 7, 2009 through February 4, 2010.¹³⁶ That period was bookmarked, on one end, by the seating of Senator Al Franken of Minnesota as the 60th Democratic senator following a long recount, and, on the other end, by the seating of Scott Brown, a Republican from Massachusetts, after a special election that reduced the Democratic caucus to 59.¹³⁷ During that interval, the Obama administration’s appointees to cross-party seats were 0.111 points more liberal than they had been in the period between President Obama’s inauguration and Senator Franken’s swearing-in. This slightly more liberal tilt in cross-party appointees during a period in which Democrats controlled the White House and held a supermajority in the Senate hints at a demand-side effect.

Trends following Senator Brown’s seating, however, cut against the demand-side theory. Following Brown’s seating, Senate Democrats saw their filibuster-proof supermajority end. The demand-side theory predicts that cross-party appointees would trend conservative based on Senate Republicans’ relatively greater power in this period. Yet in the 12 months following Brown’s seating, cross-party appointees were 0.093 points more *liberal* than they were during interval in which the Democrats held a supermajority. This slight liberal trend continued through the date on which Senate Democratic leadership exercised the nuclear option.

¹³⁵ See Walter Oleszek, Changing the Senate Cloture Rule at the Start of a New Congress, CRS Rep. for Congress (Dec. 12, 2016), available at <https://fas.org/sgp/crs/misc/R44709.pdf> (last visited July 3, 2017).

¹³⁶ See Monica Davey and Carl Hulse, Franken’s Win Bolsters Democratic Grip in Senate, N.Y. Times (June 30, 2009) (stating that Franken’s seating would give the Democrats 60 seats in the Senate, which is sufficient to overcome a filibuster); Janet Hook, Republican Scott Brown of Massachusetts Sworn In to Senate, L.A. Times (February 4, 2010) (stating that Brown’s seating would reduce the Democrats’ numbers to 59, depriving them of this ability).

¹³⁷ See *id.*

Table 5 compares the actual trends in cross-party appointee ideology around these demand-side pivotal moments with the effects that we might predict on the basis of the demand-side theory. (In all intervals in the table, cross-party appointees are Obama appointees to Republican seats.) In only one of the three intervals—roughly what one might expect from three coin flips—does reality line up with the predictions generated by the demand-side theory. While we cannot entirely rule out the possibility that the opposition party’s ability to block a nomination has a modest effect on the ideological composition of multimember agencies, the evidence from these Obama-era shocks casts significant doubt on the demand-side story.

Table 5: Using Demand Shocks to Assess the Demand-Side Hypothesis

Intervals	Obama Inaugurated – Franken Seated	Franken Seated – Brown Seated	Brown Seated – Nuclear Option Exercised	Nuclear Option Exercised – End of Democratic Majority
Demand-side theory predicts cross-party appointees will be ...	–	more liberal than previous period	more conservative than previous period	more liberal than previous period
Cross-party appointees actually were ...	–	more liberal than previous period	more liberal than previous period	more conservative than previous period

But perhaps the demand-side mechanism is subtler than simply whether a completely unified cross-party could prevent a floor vote. After all, senators rarely utilize their Rule XXII prerogative for nominees to executive-branch positions.¹³⁸ Of those executive-branch nominations that are reported out of committee, only 4% die on the floor, a figure that includes failures to pass a cloture motion to end a filibuster, filibuster threats, and individual senators’ holds on nominations.¹³⁹ By contrast, Senate committees fail to report out approximately 20% of nominations, which effectively ends these nominees’ chances of confirmation in most cases.¹⁴⁰ The role that majority-party-dominated committees play in the process suggests that a Senate party’s influence over nominations is far broader—and, perhaps, harder to define—than simply the binary matter of whether the party (if completely unified) possesses 41 votes to deny cloture.

To test the hypothesis that the power of the cross-party in the Senate influences the President’s choice of moderates or ideologues for cross-party seats on PBR agencies, we regress the ideological distance between each cross-party

¹³⁸ See Bonica, Chen & Johnson, *supra* note 105, at 10.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

appointee and the appointing President (“CFscore Difference”¹⁴¹) on the cross-party’s seat share in the Senate at the time of each appointment (Model 1). As an alternative specification, we also regress CFscore Difference on whether the cross-party held a Senate majority at the time of the appointment (Model 2); “Divided Government” is coded as 1 if the cross-party held at least 51 Senate seats.¹⁴² Finally, Models 3 and 4 add a time-trend variable into the mix. “Time” signifies the number of years since the inception of the series in 1979 that a given cross-party appointee was confirmed. Including both “Time” and either “Cross-Party Seat Share” or “Divided Government” in these final two models, enables us to pit the supply-side and demand-side hypotheses directly against each other.

Table 6: Senate Composition and Cross-Appointee Selection

	<u>Model 1</u>	<u>Model 2</u>	<u>Model 3</u>	<u>Model 4</u>
Cross-Party Seat Share	-0.036 (0.027)	—	-0.027** (0.009)	—
Divided Government	—	-0.294 (0.227)	—	-0.202* (0.100)
Time (Years Since 1979)	—	—	0.043*** (0.006)	0.044*** (0.005)

n = 216. Unit of analysis: *Cross-party* appointees to 23 agencies during the 1979-2014 period. Carter years include 1979-1980 only; Obama years include 2009-2014 only. Dependent variable: CFscore Difference. Robust standard errors clustered at the two-year Congress-level are given in parentheses. Table includes fixed effects for each presidency (baseline category: Carter administration). *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$. All models are estimated via OLS regression.

Table 6 shows no support for the hypothesis that the cross-party’s power in the Senate encourages the President to choose cross-party appointees to PBR agencies whose views are further from the President’s own. The coefficient estimates for Cross Party Seat Share and Divided Government are negative in all four models (and statistically significant in two of the four), indicating the President selects cross-party appointees who are *closer* to his or her ideal point when the cross-party is more powerful in the Senate. These negative estimates are precisely the opposite of the demand-side theory’s predication: that a stronger cross-party in the Senate should pull cross-party appointees in its direction and away from the President’s ideal point.

¹⁴¹ Recall that positive values of CFscore in a Democratic (Republican) administration indicate that the mean appointee is more conservative (liberal) than the appointing President.

¹⁴² To create both Cross-Party Seat Share and Divided Government, independent senators who caucus with a particular party are classified as members of that party.

By contrast, the coefficient estimates for Time are positive and statistically significant in both of the models in which they appear (Models 3 and 4). As the series progresses—and as partisan sort proceeds—cross-party appointees steadily become more extreme. When tested in competition with the demand-side theory, the supply-side theory retains its explanatory power.

None of this is to suggest that individual senators are irrelevant to the selection of cross-party appointees.¹⁴³ In particular, the leader of the opposition party in the Senate (i.e., the minority leader when the President's party controls the Senate, or the majority leader when it does not) often plays an outsized role in the process.¹⁴⁴ Senate Republican leader Bob Dole sent recommendations for cross-party appointments to President Clinton throughout the latter's first term.¹⁴⁵ Dole's successor as Senate Republican leader, Trent Lott, continued the practice¹⁴⁶—in one case clashing with fellow Republican Senator Orrin Hatch regarding the respective roles of the leader and Senate committee chairs in cross-party appointments.¹⁴⁷ Senate Democratic leaders Tom Daschle and Harry Reid frequently forwarded names for cross-party appointments to President George W. Bush.¹⁴⁸ According to one account, Senate Republican leader Mitch McConnell made a particularly concerted effort to advance conservative ideologues for cross-party seats under President Obama, whereas earlier leaders often selected nominees on the basis of

¹⁴³ See, e.g., Floyd Norris, *Independent Agencies, Sometimes in Name Only*, N.Y. Times (Aug. 9, 2013), <http://www.nytimes.com/2013/08/09/business/independent-agencies-sometimes-in-name-only.html> (noting that senior senators have been “instrumental” in the selection of SEC commissioners in recent years).

¹⁴⁴

¹⁴⁵ Kamen, *supra* note 59, at A21; see also John Maggs, *GOP Lawmakers Oppose Bragg as ITC Chairman*, J. Commerce, May 26, 1994, at 1A (noting that other Republican lawmakers were upset with Dole's recommendation for a cross-party seat on the International Trade Commission); Dina Elboghday, *Owen Sees ICC Post as Capital Opportunity*, Orange Cnty. Reg. (Feb. 5, 1995) (noting that Clinton cross-party appointee to Interstate Commerce Commission had been recommended by Dole); Lynn Stevens Hume, *Dole Urges Clinton To Name Unger, Banking Committee Lawyer, to SEC Post, Bond Buyer*, Sept. 19, 1995, at 1 (noting that Dole had recommended that Clinton name a Republican Senate aide to a cross-party seat on the SEC).

¹⁴⁶ See, e.g., *Senate Spat Over Lott's FCC Picks*, Wired (Apr. 10, 1997), <https://www.wired.com/1997/04/senate-spat-over-lotts-fcc-picks>.

¹⁴⁷ See Michael Grunwald, *Sentencing Panel's Own Terms Are Up*, Wash. Post (Aug. 28, 1998), https://www.washingtonpost.com/archive/politics/1998/08/28/sentencing-panels-own-terms-are-up/da055846-230d-448f-b33c-11f596cb1f4d/?utm_term=.47875b15ee4f (noting conflict between Lott and Hatch). The Sentencing Commission, an advisory panel, is located in the judicial rather than executive branch and so is excluded from our empirical analysis.

¹⁴⁸ See, e.g., Mark Wigfield, *Sen. Daschle Recommends Democratic Aide for FCC Post*, Dow Jones News Serv. (Nov. 15, 2001); Judith Burns, *Daschle Recommends Hispanic-American Candidate for SEC*, Dow Jones News Serv. (Jan. 7, 2002); *Daschle Recommends Goldschmid for SEC*, Am. Banker, Jan. 30, 2002, at 4; Jenny Anderson, *Democrats Push S.E.C. Official for Commission Seat*, N.Y. Times (May 18, 2005), [http://query.nytimes.com/gst/fullpage.html?res=9E0CE2DA1639F93BA25756C0A9639C8B63](http://query.nytimes.com/gst/fullpage.html?res=9E0CE2DA1639F93BA25756C0A9639C8B63;);

home-state connections or recommendations from other caucus members.¹⁴⁹ Most recently, a spokesman for Minority Leader Charles Schumer said in March 2017 that Senate Democrats “intend to assert our prerogative on nominees as always has been done,”¹⁵⁰ and Schumer has advanced several Democrats for cross-party appointments in the months since President Trump took office.¹⁵¹

But while the leader of the opposition party in the Senate no doubt plays an important role in the selection process, we do not believe that the widening ideological gap between co-party and cross-party appointees can be attributed to Senate leadership. First, the role of Senate leaders is purely advisory. As a formal matter, any provision that vested a Senate leader with the statutory power to choose an executive branch officer would violate the Appointments Clause of Article II.¹⁵² And as a practical matter, Presidents do not always follow the suggestions of Senate leaders. For example, then-Senate Minority Leader Dole complained that President Clinton often chose “Clinton Republicans” for cross-party seats and ignored Dole’s recommendations.¹⁵³ Likewise, then-Senate Majority Leader Harry Reid complained in 2008 that although he and President George W. Bush “were able to work cooperatively on [cross-party] nominations” through most of Bush’s second term, “there has been a notable shift in the President’s stance on these nominations from one of cooperation to intransigence,” with the Bush White House rejecting several of Reid’s suggestions during the final year of the Bush presidency.¹⁵⁴

Second, when Senate leaders recommend nominees, they do so in the shadow of the White House’s range of acceptable options. Thus, even when the President follows the opposition party leader’s recommendation, it would be a mistake to attribute the appointment to the opposition party leader alone. Former aides to Senate leaders describe a back-and-forth process whereby the leader proposes an appointee

¹⁴⁹ See Daniel Foster, Agent McConnell, *Nat’l Rev.*, June 3, 2013, at 30.

¹⁵⁰ Kelcee Griffis, Trump Nixes Rosenworcel Nomination To Return to FCC, *Law360* (Mar. 2, 2017), <https://www.law360.com/articles/897483/trump-nixes-rosenworcel-nomination-to-return-to-fcc> (quoting Schumer spokesman).

¹⁵¹ See, e.g., David Lieberman, President Trump Renominates Jessica Rosenworcel to FCC, *Deadline* (June 14, 2017), <http://deadline.com/2017/06/president-trump-renominates-jessica-rosenworcel-fcc-1202113089> (noting that Schumer recommended Trump cross-party nominee); Harper Nedig, Schumer Recommends Consumer Advocate for FTC, *The Hill* (May 8, 2017), <http://thehill.com/regulation/finance/332535-schumer-recommends-consumer-advocate-for-ftc>.

¹⁵² See *Buckley v. Valeo*, 424 U.S. 1, 127-37 (1976) (striking down provision in the Federal Election Campaign Act that purported to authorize the President pro tempore of the Senate and Speaker of the House to choose four members of the FEC).

¹⁵³ Kamen, *supra* note 59, at A21.

¹⁵⁴ Martin Kady II, Reid Letter Shows White House Rejected Nominee Compromise, *Politico* (Feb. 28, 2008), <http://www.politico.com/blogs/politico-now/2008/02/reid-letter-shows-white-house-rejected-nominee-compromise-006621> (quoting letter from Reid to White House Chief of Staff Joshua Bolton). Reid’s letter also made the surprising—and flatly false—claim that “I have the *statutory* authority to make recommendations to the President for Democratic positions on independent boards and commissions.” *Id.* (emphasis added).

to a cross-party seat and the White House either accepts the nomination or offers a counterproposal.¹⁵⁵ These negotiations are sometimes bound up in bargaining between the White House and senators over issues unrelated or tangential to the appointment in question.¹⁵⁶

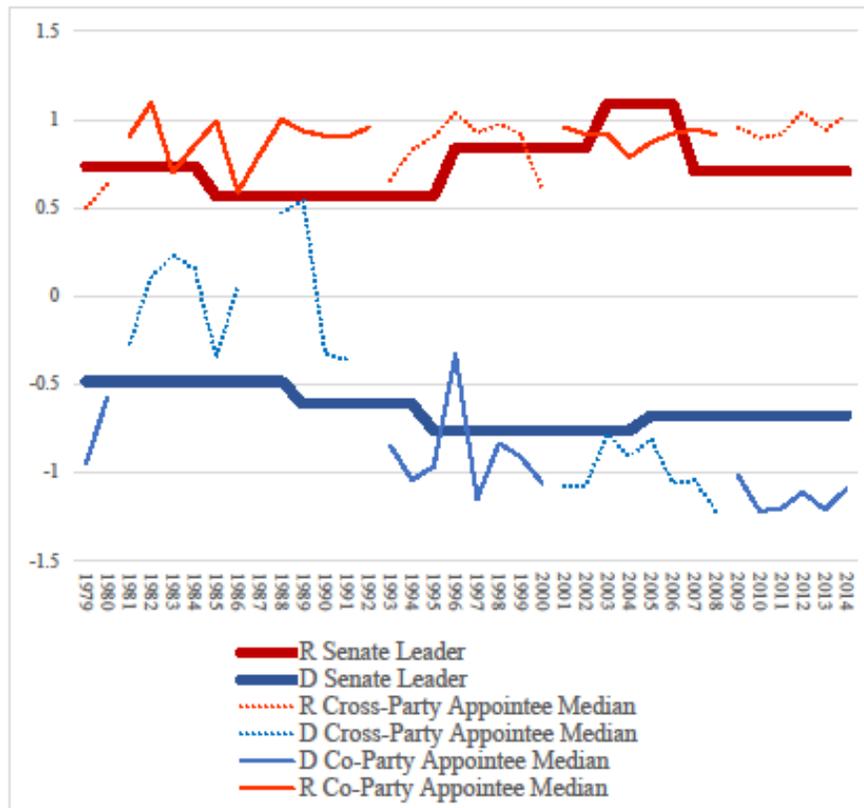
Third, insofar as cross-party appointments are driven by the opposition party's Senate leader, we would expect that leader's influence to be at its peak when the opposition party holds more seats in the Senate. Yet as illustrated by Table 6, our data do not bear out that prediction. Remarkably, the extent to which Presidents choose genuine cross-partisans for multimember commission seats has no apparent relationship to the political power of the opposition party leader.

Fourth and finally, while the median Senate Democrat and median Senate Republican have grown farther apart ideologically over the course of our study period, we see much less ideological movement among the party's respective Senate leaders. Figure 8 compares the CFscores for the Senate Democratic and Republican leaders, denoted with bold lines, with the median appointees to Democratic and Republican seats on agencies with PBRs; appointees to co-party seats are denoted with thin, solid lines, whereas appointees to cross-party seats are denoted with dotted lines. As the figure shows, changes over time in the median CFscores of cross-party appointees bear little discernable relationship to changes in the CFscores of Senate leaders. For example, Mitch McConnell, who led the Senate Republicans through the Obama years, has a CFscore that is 0.030 points lower (less conservative) than Howard Baker, the Senate Republican leader under Carter, whereas the median cross-party (Republican) appointee under Obama is 0.386 points more conservative than the median cross-party appointee under Carter. In other words, Republicans appointed by Democratic Presidents grew much more conservative even while the Senate Republican leader (as measured by CFscore) grew slightly less so. Likewise, Harry Reid, who led the Senate Democrats during George W. Bush's second term, has a CFscore that is only 0.194 points lower than that of Robert Byrd, the Senate Democratic leader under Reagan, while the median CFscore for George W. Bush's cross-party (Democratic) appointees is 1.190 points lower than the median CFscore for Reagan's cross-party appointees. That is, Democrats appointed by Republican Presidents grew substantially more liberal even while the CFscore for the Senate Democratic leader barely budged. In sum, we find little evidence to suggest that the divergence between co-party and cross-party appointees over our study period can be explained by an increase in the power of opposition party senators or Senate leaders in the selection process.

¹⁵⁵ Telephone Interview with Ronald Weich, former chief counsel to Sen. Reid (Aug. 29, 2017); Telephone Interview with Steve Seale, former chief counsel to Sen. Lott (Aug. 30, 2017).

¹⁵⁶ E-mail from Senator Jon Kyl, Former Senate Minority Whip, to authors (Aug. 25, 2017, 16:33 EDT) (on file with authors) (“[T]he minority is always looking for leverage, and nominations for anything work.”).

Figure 8: Senate Leaders and Appointees to Agencies with PBRs



3. Search Costs

Along with increased partisan sort, another broad social phenomenon may have increased PBRs' bite occurred during this period: an information-technology revolution that slashed the cost of obtaining data on nominees. Forty years ago, learning about the detailed political views of a potential appointee might require using one's Rolodex to contact members of the appointee's social or professional circle and investing the time and political capital to convince these mutual connections to speak candidly (and, naturally, as a prerequisite, one would need to have the connections and status to pull this off). Today, one can procure similar information with a few keystrokes—as we did. As a result, a wide variety of interested parties—including Senate staffers, activists, and journalists—can inexpensively obtain information regarding the ideologies of potential appointees. In light of the reduction in the costs associated with obtaining this information, perhaps the President's ability to present conservative Democrats and liberal Republicans as stealth nominees has diminished.

While this search-costs hypothesis has some appeal, we are skeptical that it is driving our results for three reasons. *First*, this hypothesis understates the amount of information concerning potential appointees' donations that was publicly accessible throughout this period. The FEC has a long-established reputation for facilitating public access to its data.¹⁵⁷ For virtually the entire period, the FEC considered reports on receipts and FEC-generated indices of these receipts to be subject to the Freedom of Information Act, and thus endeavored to provide "the fullest possible disclosure" to the public.¹⁵⁸ In 1980, Congress required the FEC to make reports submitted by campaigns "available for public inspection," and to "develop a filing, coding, and cross-indexing system" to facilitate public access.¹⁵⁹ The FEC met this obligation that same year.¹⁶⁰ Since 1996, the FEC has provided to the public comprehensive electronic records of campaign contributions dating back to the late 1970s.¹⁶¹ In 1998, the FEC debuted an Internet-based search function that allows users to search the FEC's online database for specific donors by name.¹⁶²

Access to campaign contributions data likely was more difficult prior to the current era of searchable online databases. Still, interested parties had the means to access this information throughout the study period. Even during the years in which identifying contributors required reviewing indices of campaign contributions, the stakes to Presidents, senators, and affected interest groups of placing a "disloyal" appointee on a board or commission likely were sufficiently high—and the resources available to these individuals and entities sufficiently deep—to outweigh these relatively modest search costs.

Second, political donations are but one of several ways to convey an individual's partisan affiliation. Presidents and senators could employ many other screens to divine potential appointees' partisan affiliations: for instance, whether an individual consistently votes in party primaries, has a record of volunteering for

¹⁵⁷ See R. Sam Garrett, *The Federal Election Commission: Overview and Selected Issues for Congress*, CRS Rep. for Congress, Dec. 22, 2015, at 17 ("[T]he FEC generally is praised for its role in publicizing campaign finance data."); Jeremy Gaunt, ed., *A Rocky Decade Later, the FEC Gets Little Respect*, Campaign Practices Rep., Feb. 11, 1985, at 2 ("[M]ost . . . are willing to credit the agency with at least one major success. . . . [T]he FEC has built on earlier attempts to make campaign finance data open to public scrutiny and has made disclosure of campaign dollars and accepted and expected part of the electoral process.").

¹⁵⁸ See 11 C.F.R. §§ 5.2(a), 5.4(a)(1) (2010); accord 65 Fed. Reg. 9206 (Feb. 24, 2000); 52 Fed. Reg. 39213 (Oct. 21, 1987); 52 Fed. Reg. 23638 (June 24, 1987); 50 Fed. Reg. 50778 (Dec. 12, 1985); 45 Fed. Reg. 31292 (May 13, 1980) (versions of the rule in effect between 1980 and 2010); but see 44 Fed. Reg. 33368 (June 8, 1979) (stating that FOIA does not apply to reports of receipts and related indices).

¹⁵⁹ Pub. L. 96-187, § 311(a)(3)-(4) (Jan. 8, 1980).

¹⁶⁰ Telephone Interview with Senior Public Affairs Specialist, Public Records Branch, Federal Election Commission (May 30, 2017).

¹⁶¹ Press Release, Federal Election Commission, *FEC Launches New Web Info*, July 21, 1998, available at <http://classic.fec.gov/press/press1998/websrch.htm> (last visited June 20, 2017).

¹⁶² *Id.*

political campaigns, or participates in a political party or party-connected group. Indeed, the secular decline in mass participation in civic activity over the past several generations suggests that, in some respects, it may have been easier to discern an individual's partisan affiliation in 1979 than in 2014.¹⁶³

Third, we construct what should be a relatively easy test for the search-costs hypothesis – and obtain null results. This test exploits the FEC's introduction of a search function for its online database of campaign contributions on July 21, 1998, which constituted the single greatest reduction in search costs during this period. If the search-costs hypothesis is doing any significant work, we would expect to see it here. Yet we do not.

Model 1 in Table 7 is similar to the regression models presented in Table 6 above, except that here, we add a dummy variable denoting whether the nomination occurred after the search function for the FEC's online database became publicly accessible on July 21, 1998.¹⁶⁴ A positive, statistically significant estimate for this coefficient would support the alternative hypothesis that greater access to information reduced the White House's ability to get a "cross-partisan in name only" past opposition party senators. Model 1, however, shows a null result.

Model 2 tests a slight variation on the alternative hypothesis. What if interested parties gradually began to adapt to the FEC website's new search function, whether because they learned about the function over time through word of mouth or because old-guard staffers were secularly replaced with more internet-savvy political operatives? Instead of a discrete jump in effect size following the roll-out of the search function, we would expect the time trend in the dependent variable to pick up speed after July 21, 1998. In other words, we would expect a positive coefficient on the interaction of the "date of nomination" and "nomination after July 21, 1998" variables tests for this phenomenon. As Model 2 shows, however, the coefficient on the interaction term is statistically insignificant and, in fact, weakly negative.¹⁶⁵ In

¹⁶³ Further, to the extent that members of Congress are consulted in executive appointments, the fraying personal connections between legislators and their individual constituents presents an additional impediment to evaluating a potential appointee's partisan loyalty that is more significant in the later years of the study period. Compare Richard F. Fenno, Jr., *Home Style: House Members in their Districts* (1978), with Richard F. Fenno, Jr., *The Challenge of Congressional Representation* (2013).

¹⁶⁴ Observations in Table 7 are limited to the 145 cross-party appointees for whom we were able to obtain the exact date of nomination.

¹⁶⁵ We also ran a series of placebo tests, substituting July 21 of the years 1993-1997 and 1999-2007 in place of the "Nomination after July 21, 1998" variable and interaction-term component. These dates have no special relevance; we included them simply to determine whether the coefficient estimates in models including these dates differ in any meaningful way from the estimates reported in Table 7. The results of these placebo tests are substantially similar to those reported in Table 7 (although the divided government variable lacks statistical significance in most of these placebo models, as expected).

To determine whether a discontinuity in cross-appointee ideology exists around July 21, 1998, we constructed a regression-discontinuity model. However, a relative lack of observations

other words, we find little evidence that the ideological distance between the President and cross-party appointees increased at a faster pace after the FEC's website search rollout.

Table 7: Effects of FEC Search Functionality on Cross-Appointee Selection

	<u>Model 1</u>	<u>Model 2</u>
Divided Government	-0.304 (0.155)	-0.332 (0.170)
Date of Nomination	0.042** (0.015)	0.045* (0.017)
Nomination after July 21, 1998?	0.036 (0.272)	40.636 (98.771)
Date of Nomination * Nomination after July 21, 1998?	--	-0.020 (0.049)

n = 145. Unit of analysis: *Cross-party* appointees during the 1979-2014 period for whom we know the exact date of nomination (a subset of the dataset used in previous models). Dependent variable: CFscore Difference. *** signifies $p < 0.001$, ** $p < 0.01$, * $p < 0.05$. All models are estimated via OLS regression. Parameter estimates for the intercepts are omitted.

To sum up so far: Our results are consistent with a supply-side story in which partisan sort starting in the 1980s tightened the relationship between party affiliation and ideology, and so the preferences of cross-party appointees increasingly diverged from those of the appointing President. Our results are less consistent with a demand-side story in which the power of the opposition party in the Senate (or the influence of its leader) drives change over time in the ideological composition of multimember agencies. Finally, we find no support for the hypothesis that an Internet-induced reduction in search costs has prevented recent Presidents from

around the July 21, 1998 cut-point impeded the analysis; using any reasonable set of parameter assumptions, the `rdbwselect` function in R recommended bandwidths of approximately 2 years – hardly a knife-edge. Using this bandwidth, the model reported a statistically significant, positive discontinuity at the cut-point. But we do not put much stock in this result; given the unacceptably large bandwidth size, the model likely is picking up the well-documented time trend and misreporting it as a “knife-edge” discontinuous jump.

Finally, we constructed a regression-kink model, which tests for a discontinuous change in slope, rather than an upward shift in the regression curve, at around this date. The theory here is that interested parties may have learned about (and learned how to use) the FEC's searchable database gradually, and therefore we might expect a change in the rate of growth in the ideological gap after this date, rather than an abrupt increase. This model reported null results, but, once again, serious bandwidth selection issues prevent firm conclusions.

filling cross-party seats with individuals whose campaign contributions reveal themselves to be out of step with their party of registration.

4. Identity Signaling

Finally, the notion that appointment-seeking members donate solely to convey that they are loyal party members may bear on this analysis. Consider, for instance, a highly regarded product safety lawyer angling for a seat on the Consumer Product Safety Commission. Her qualifications are unimpeachable, but her involvement in partisan politics is either trivial or dated.¹⁶⁶ She may therefore benefit from donating to her party's candidates solely to convey that she is a member of that party. This rationale stands apart from the sincere-versus-strategic dichotomy discussed in subsection II.B.3. Although this behavior obviously is not a sincere expression of closely held beliefs, neither is it strategic in the sense that it is designed to misrepresent an individual's ideological preferences. It simply broadcasts: "I am a member of this team."

If this motivation for political giving is widely held, then changes in appointees' ideal point estimates over time might not capture genuine changes in their political views. Rather, if members of the political class donate mechanistically to candidates on their party's ticket, and the ideological composition of the ticket changes over time as a result of partisan sort among candidates, then the observed longitudinal changes in appointees' ideal point estimates would be epiphenomenal. Phrased another way, whereas a Washington lawyer could show loyalty to the Republican Party in 1970 by donating the Nelson Rockefeller, today he might do so by giving to Ted Cruz. Neither action is necessarily infused with much meaning; they both convey party loyalty—and, perhaps, nothing more.¹⁶⁷

We acknowledge that partisan sort among candidates may encourage donors interested solely in signaling their party loyalty to support more extreme candidates in 2014 than in 1979. But we caution that this theory's explanatory power is limited. First, it cannot account for the fact that co-party and cross-party appointees differed markedly throughout the 1980s and 1990s. That Democrats selected by President Carter exhibit sharply different donation activity than Democrats selected by

¹⁶⁶ This example is loosely based on Marietta Robinson, a product-safety lawyer with a long career representing both plaintiffs and defendants. Robinson ran as a Democrat for a Michigan Supreme Court seat in 2000, served in several nonpartisan positions in the 2000s, and was appointed by President Obama to a Democratic seat on the CPSC in 2013.

¹⁶⁷ Cf. Vaclav Havel, *The Power of the Powerless* (1978) ("I think it can safely be assumed that the overwhelming majority of shopkeepers never think about the slogans they put in their windows, nor do they use them to express their real opinions. That poster was delivered to our greengrocer from the enterprise headquarters along with the onions and carrots. He put them all into the window simply because it has been done that way for years, because everyone does it, and because that is the way it has to be. If he were to refuse, there could be trouble.").

President Reagan casts doubt on the notion that appointment-seekers' ideal point estimates merely reflect the ideal points of their party's candidates.

Second, and somewhat to our surprise, we found that appointees to PBR agencies routinely make contributions to candidates from both political parties. Even among appointees to the high-profile, highly politicized FCC, fully a third of appointees in our dataset (11 out of 33) donated to both Democratic and Republican candidates. If likely nominees are using campaign contributions solely to signal that they are on "Team Blue" or "Team Red," the signals they are sending are remarkably noisy.

Third, even with the trend towards polarized parties, donors who give exclusively to candidates from one party still have a wide variety of options from which to choose. In 1980, the mean Republican candidate on a general election ballot for state or federal office had a CFscore of 0.770, while the mean Democratic candidate's score was -0.365. (Recall that a higher CFscore indicates greater conservatism.) By 2014, those means were 1.046 and -0.985, respectively. But the standard deviations around these means also increased between 1980 and 2014: from 0.368 to 0.573 for Republicans from 0.529 to 0.668 for Democrats.¹⁶⁸ In other words, party-loyal donors in 2014 could donate to a candidate who adopted the posture of a 1980-style Democrat (or 1980-style Republican) and who still was located within one standard deviation of the current party mean. That Democratic (Republican) appointees did not do so, and instead chose to give to more liberal (conservative) appointees, provides further support for the claim that appointees themselves have grown more extreme.

III. IMPLICATIONS AND EXTENSIONS

We can now say with some confidence that PBRs are more than paper tigers—that they do indeed lead Presidents to choose cross-party appointees with divergent ideological preferences. Our results have clear implications for the leading accounts of partisan balance requirements in the political science and administrative law literatures. Our results also suggest avenues for future research on the effects of PBRs. This last Part considers those implications and potential extensions of our project.

A. *The Monitoring Account*

One perspective on PBRs in the political science and administrative law literature emphasizes the relationship between PBRs and the cost of monitoring agency actions. PBRs can reduce monitoring costs for Congress in three ways. First,

¹⁶⁸ See Adam Bonica, "All Recipients, 1979-2014" [data file], Database on Ideology, Money in Politics, and Elections (DIME) (Aug. 16, 2016), *available at* <https://dataverse.harvard.edu/dataverse/dime> (last visited July 3, 2017).

minority party commissioners are likely to sound a “fire alarm” if the majority on the commission embarks on a potentially controversial course of action.¹⁶⁹ These “fire alarms” make it easier for lawmakers to keep an eye on agencies: Instead of reviewing every agency action individually, Congress can focus on instances in which minority party members dissent from a commission decision.¹⁷⁰ Second, beyond simply sounding an alarm, minority commissioners might further reduce the costs of congressional oversight by providing lawmakers with information about the consequences of agency actions as well as ways to overturn those actions.¹⁷¹ Third, and relatedly, the same fire alarms that alert Congress to questionable commission decisions also alert the courts.¹⁷² This third mechanism can be considered as part of a multipronged strategy of congressional control: Congress creates agencies subject to PBRs; Congress also provides for judicial review of agency actions; and minority commissioners alert the courts to instances in which agency actions deviate from statutory directives.

The monitoring account might lead us to expect that lawmakers would be most likely to impose PBRs when they are most worried about the executive branch straying from their own policy preferences. Consistent with this expectation, David Lewis observes that the percentage of new agencies with appointment limitations such as PBRs is highest in periods of divided government.¹⁷³ Note, though, that while Lewis’s finding is consistent with the monitoring account, it does not confirm that account. Even if opposing party lawmakers *seek* to reduce monitoring costs by imposing PBRs on new multimember agencies, their efforts may prove fruitless.

What we can say is that certain empirical findings make the monitoring account appear more plausible. For the monitoring account to be accurate, a

¹⁶⁹ Barkow, *supra* note 87, at 41 (“[W]hen an agency is composed of members of different parties, it has a built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction. That dissent, in turn, serves as a ‘fire alarm’ that alerts Congress and the public at large that the agency’s decision might merit closer scrutiny.” (footnotes omitted)). The origins of the “fire alarm” theory trace back to work by political scientists Matthew McCubbins and Thomas Schwartz. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 *Am. J. Pol. Sci.* 165 (1984).

¹⁷⁰ Alexander Bolton, *Collegial Leadership Structures, Ideological Diversity, and Policymaking in the United States* 12 (Aug. 15, 2015) (unpublished manuscript).

¹⁷¹ *Id.* The presence of minority commissioners also may encourage *majority* commissioners to provide greater information than they otherwise would. Even the prospect of a dissent may serve an information-forcing function, compelling commissioners in the majority to provide more fulsome explanations for their decisions in an effort to dampen the potential dissenters’ fire alarm. Cf. Catherine M. Sharkey, *State Farm “With Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 *N.Y.U. L. Rev.* 1589, 1605, 1657--60 (2014) (arguing that the prospect of inspector-general investigations, congressional hearings, or judicial review may compel agencies to provide better-reasoned explanations for their actions).

¹⁷² Bolton, *supra* note 170, at 13.

¹⁷³ David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 54 (2008).

necessary but not sufficient condition is that PBRs actually lead to ideologically diverse agencies with minority members who will alert Congress and the courts if agency leaders stray from legislative preferences or statutory directives. In that respect, our finding that the ideological preferences of cross-party appointees in recent years have indeed diverged from the preferences of the appointing President supports the monitoring account's claims.

Importantly, however, the fact that PBRs produce ideological diversity on multimember agencies does not prove that PBRs succeed in reducing monitoring costs for Congress and the courts. First, members whose ideological preferences diverge from the White House occupant's may still exhibit loyalty toward the President who appointed them. Lee Epstein and Eric Posner have documented a powerful "loyalty effect" among Supreme Court Justices, who are more likely to vote with the Solicitor General when the President who appointed them remains in office.¹⁷⁴ This loyalty effect is distinct from the phenomenon of Supreme Court Justices tending to support the administration when the President is of the same party as the Justice's appointer; the loyalty effect is person-specific rather than party-specific. A similar loyalty effect among members of PBR agencies might lead a conservative Republican to support the policies of a Democratic President who appointed her (and likewise for a liberal Democrat appointed by a Republican President). A loyalty effect among cross-party appointees might undermine the monitoring value of ideological diversity at multimember agencies, because minority party members might be reluctant to interfere with the agenda of a President to whom they feel gratitude.

Second, even in the absence of a loyalty effect, agency members whose ideological preferences diverge from the President's might do little to reduce monitoring costs for Congress and the courts. Minority party members might be excluded from access to information about agency decisionmaking, or they might be reluctant to blow the whistle on their majority party colleagues, or their "fire alarms" might go unheeded by lawmakers and judges. Evaluating the strength of the monitoring account thus requires more than simply knowing how PBRs affect the ideological composition of multimember agencies. We would need to know whether the ideological composition of multimember agencies has observable effects on interactions between agencies and Congress, and between agencies and courts.¹⁷⁵

While the analysis above cannot answer all questions regarding the monitoring account's accuracy, our topline results do provide guidance for researchers studying this subject. Most significantly, our findings suggest that the

¹⁷⁴ Epstein & Posner, *supra* note 100.

¹⁷⁵ One of us has begun a project of using empirical methods to study the effectiveness of congressional oversight of administrative agencies. See Brian D. Feinstein, *Congress in the Administrative State*, 95 *Wash. U. L. Rev.* (forthcoming 2018), available at <https://ssrn.com/abstract=2943074>. Studying the relationship between ideological composition and congressional oversight is a potentially fruitful path for future research.

effect of PBRs on monitoring costs may be time-variant: how PBRs affected interactions between agencies and Congress—and between agencies and courts—in the 1980s is not necessarily predictive with regard to later years. Our results suggest that the effects of PBRs on the ideological composition of multimember agencies from the Clinton presidency onward are quite unlike the effects under Presidents Carter, Reagan, and George H.W. Bush, and so the follow-on consequences for monitoring costs may be different for later periods than for earlier ones.

B. The Deliberative Account

A second account of PBRs (which is distinct from, but not inconsistent with, the monitoring account above) draws from the social psychology literature on group polarization. Group polarization occurs “when an initial tendency of individual group members toward a given direction is enhanced following group discussion.”¹⁷⁶ Numerous studies have documented this phenomenon.¹⁷⁷ Cass Sunstein, who is largely responsible for bringing the group polarization literature to the attention of administrative law scholars, highlights two explanations for the observed patterns of polarization. One emphasizes “social comparison”: people want to be perceived favorably by their peers, and so when surrounded by others with liberal (conservative) views, they will seek favor by adjusting their own views to be more liberal (conservative).¹⁷⁸ A second explanation stresses “limited argument pools”: individuals are influenced by the arguments they encounter, and an individual confronted with only liberal (or only conservative) arguments is likely to move further in that direction. Both of these explanations might suggest that while individuals surrounded by others with likeminded views will grow more extreme,

¹⁷⁶ Daniel J. Isenberg, Group Polarization: A Critical Review and Meta-Analysis, 50 *J. Personality & Soc. Psychol.* 1141, 1141 (1986).

¹⁷⁷ Early experiments involved 18- and 19-year-old students in Paris who were asked about their attitudes toward France’s then-President, Charles de Gaulle, and about their attitudes toward the United States. Initial attitudes toward de Gaulle were “mildly favorable”; after group discussion, sentiments toward the President became even more favorable.¹⁷⁷ Initial attitudes toward the United States were “mildly negative”; these views tended to become more negative following discussion. In both cases, group deliberation pushed group members toward the extreme. Roger Brown, *Social Psychology* 223--24 (2d ed. 1986).

In another study, subjects were presented with traffic felony scenarios and asked to rate defendants’ guilt (from “definitely not guilty” to “definitely guilty”). They then discussed their impressions and re-rated the defendants. The discussion process consistently led subjects to become more extreme in their views. With respect to scenarios in which most subjects initially considered the defendant to be guilty, group discussion strengthened their confidence in that view. When most subjects initially considered the defendant to be innocent, discussion likewise pushed subjects even further toward the innocence extreme. See David G. Myers & Martin F. Kaplan, Group-Induced Polarization in Simulated Juries, 2 *Personality & Soc. Psychol. Bull.* 63 (1976).

¹⁷⁸ Sunstein, *supra* note 13, at 88-89.

individuals exposed to a diversity of viewpoints may become more moderate.¹⁷⁹ This diversity-leads-to-depolarization hypothesis draws some support in the social psychology literature, though this effect is stronger for group members confronting a problem for the first time than for group members dealing with familiar and much-debated questions.¹⁸⁰

Sunstein argues that the social psychology literature on group polarization and depolarization produces potentially useful insights for agency design. “An independent agency that is all Democratic, or all Republican, might polarize toward an extreme position, likely more extreme than that of the median Democrat or Republican, and possibly more extreme than any member standing alone,” he writes.¹⁸¹ “A requirement of bipartisan membership can operate as a check against movements of this kind.”¹⁸² The verbs “might” and “can” are important: extrapolations from laboratory experiments to the real world of multimember federal agencies raise questions of external validity. Moreover, even in the absence of PBRs, agency commissioners may be exposed to a rich pool of arguments from sources other than their colleagues. Commissioners likely encounter arguments from lawyers who practice before the agency, lobbyists who seek to influence agency action, think tanks inside the Beltway, and—on especially high-profile issues—news media. Nonetheless, the literature on group polarization offers a potential explanation as to how PBRs might affect agency decisionmaking. Here, as elsewhere, ideological diversity may depolarize.¹⁸³

Like the monitoring account, the deliberative account is difficult to verify directly. What we can say is that for the deliberative account to be accurate, it must first be the case that PBRs have the immediate effect of producing ideological diversity. In this respect, our findings are supportive of the deliberative account.

¹⁷⁹ *Id.* at 89, 118--19.

¹⁸⁰ See Brown, *supra* note 177, at 226.

¹⁸¹ See Sunstein, *supra* note 178, at 103.

¹⁸² *Id.* In a similar vein, Rachel Barkow writes:

[A] partisan balance requirement . . . can avoid extremely partisan decisions As a wealth of empirical research demonstrates, a group composed solely of ideologically like-minded people tends toward extreme decision making. Liberals and conservatives alike become more liberal and conservative, respectively, when they deliberate only with likeminded people. . . . [A] commission of five members all of the same party would be even more polarized than one in which a bare majority is of the same party.

Barkow, *supra* note 87, at 40-41.

¹⁸³ To be sure, partisan balance requirements theoretically could have the opposite effect. Considering the possibility of partisan balance requirements for judicial panels, Cass Sunstein and Tom Miles note that “[p]erhaps both Republican and Democratic appointees would conceive of themselves, to a somewhat greater degree, as political partisans, simply because the requirement of mixed composition would suggest as much.” Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 *Duke L.J.* 2193, 2228 (2009).

Increasing party polarization appears to have the perhaps-unexpected effect of increasing the ideological heterogeneity of multimember agencies. No longer do Democratic Presidents fill seats on boards and commissions with likeminded liberals who differ only in their party registration. No longer do Republican Presidents stock multimember agencies with conservative Democrats and conservative Republicans. Instead, we observe PBRs leading to multimember agencies with a mix of liberal Democratic and conservative Republican members.

That members are afforded opportunities to deliberate is a second necessary condition for the deliberative account. If decisions are preordained based on the views of the chair or those of an autonomous professional staff, with the multimember structure merely serving as a rubber stamp, then deliberation either will not occur or will be irrelevant to policy outcomes. Although the evidence is limited, we think this second condition is indeed met at most multimember agencies. Commissioners are generally able to hire their own dedicated staff, and thus have the capacity to critically evaluate proposals from the chair or others and to suggest informed alternatives.¹⁸⁴ Moreover, most multimember agencies are required to undertake official action only at or after a formal meeting with a quorum, which affords at least an opportunity to deliberate.¹⁸⁵

But even assuming that these preconditions are met—namely, that PBRs foster ideological diversity and that members have opportunities to deliberate—it does not necessarily follow that deliberation actually occurs, much less that minds are changed. The question of whether ideological diversity on multimember agencies has any effect on decisional outputs still remains unanswered. But while we do not seek to answer that question here, we believe that it may be possible in future research to assess the deliberative account in further detail. For example, one might ask whether agencies that are more ideologically diverse are also less likely to be reversed by courts, or less likely to commit “infractions” of other kinds (i.e., actions that elicit criticism from inspectors general, the Government Accountability Office, or major newspapers).¹⁸⁶ One might also look at whether ideological diversity on multimember agencies affects voting patterns of individual agency members. Analogously, Thomas Miles and Cass Sunstein have found evidence suggesting that on three-member circuit court panels, the presence of an ideological minority has a moderating effect on the votes of judges in the majority.¹⁸⁷ Richard Revesz has documented a similar phenomenon in environmental law cases decided by the D.C.

¹⁸⁴ See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1168 (2000) (describing members’ ability to select and supervise their own staffs).

¹⁸⁵ See *id.* at 1236--94 (listing meeting requirements).

¹⁸⁶ On the measurement of agency “infractions,” see Feinstein, *supra* note 175, at 24--25.

¹⁸⁷ Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 *U. Chi. L. Rev.* 823 (2006).

Circuit.¹⁸⁸ While these authors use party affiliation as a proxy for ideology, our approach of using appointees' campaign contributions can allow for a richer analysis of ideological diversity and depolarization in the agency context. Down the road, we hope to examine whether ideologically diversity leads agency members to gravitate together or pull apart.

C. *The Obstruction Account*

A third and final perspective on partisan balance requirements posits that PBRs unconstitutionally interfere with presidential control over the executive branch. The Justice Department under President George H.W. Bush made a brief argument to this effect in a 1989 Office of Legal Counsel memorandum: according to the memo, PBRs violate Article II's Appointments Clause¹⁸⁹ because "[t]he only congressional check that the Constitution places on the President's power to appoint 'principal officers' is the advice and consent of the Senate."¹⁹⁰ The Office of Legal Counsel listed PBRs as one of "ten types of legislative provisions commonly included in proposed legislation that weaken the Presidency" and that the executive branch should "consistently and forcefully resist[]." ¹⁹¹

A more full-throated version of this argument emerges from recent work by Ronald Krotoszynski and coauthors. Krotoszynski et al. rely on the Supreme Court's 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁹² a case involving a five-member board created to regulate auditing of securities issuers. While the Public Company Accounting Oversight Board (PCAOB) is not subject to a PBR, its members were protected by "dual for-cause removal limitations": they could be removed only by the Securities and Exchange Commission and only for cause, and the SEC commissioners could be removed by the President only for cause.¹⁹³ The Court, in an opinion by Chief Justice Roberts,

¹⁸⁸ Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997).

¹⁸⁹ See U.S. Const. art. II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

¹⁹⁰ Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248, 250 (July 27, 1989).

¹⁹¹ *Id.* at 248. In a separate vein, law professor Jamin Raskin has argued that PBRs violate the First Amendment and the principle of equal protection because they discriminate on the basis of party affiliation. See Jamin B. Raskin, "A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?, 52 Admin. L. Rev. 609 (2000).

¹⁹² 561 U.S. 477 (2010).

¹⁹³ The SEC's organic statute actually imposes no limitation on the removal of commissioners. However, the parties in *Free Enterprise Fund* both agreed that SEC commissioners are protected by an unwritten for-cause removal limitation. See *Free Enter. Fund*, 561 U.S. at 487.

held that “the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.”¹⁹⁴ But the opinion arguably stands for the broader proposition that the President must have “meaningful oversight and control powers over independent agencies.”¹⁹⁵

Krotoszynski and coauthors argue that PBRs, when coupled with for-cause removal limitations for agency members, potentially violate the broader separation-of-powers principle embodied in the *Free Enterprise Fund* decision. They write:

Statutory partisan balance requirements quite literally force Presidents to rely on political enemies to carry out their executive duties. . . . This is especially troubling considering the increased polarization present in American political parties. . . . Essentially, statutory partisan balance requirements foster a politically polarizing environment at the heads of independent agencies. . . . [T]hese statutory partisan balance requirements force Presidents to carry out their executive duties with contentious and highly polarized agency heads . . . [and] preclude a President from appointing a sufficient number of agency commissioners in agreement with her political philosophy to overcome the debilitating effect of partisanship.¹⁹⁶

Notably, Krotoszynski and coauthors do not claim that PBRs are *always* unconstitutional. They write: “If Congress requires the President to appoint political opponents to an independent federal agency, but does not also entrench such persons with a fixed term of office or good cause protection against removal, it is difficult to see how a partisan balance requirement on these facts would significantly impede the President’s ability to oversee and direct the agency’s operations.”¹⁹⁷ In their view, it is the combination of PBRs and for-cause removal protections, rather than either of these provisions individually, that render a large swath of administrative agencies unconstitutional. They conclude: “Congress should have the choice of mandating partisan balance requirements *or* insulating principal officers who serve on agency heads from removal; it should not be permitted to impose both conditions concurrently.”¹⁹⁸

There is, on reflection, something curious about the claim that for-cause removal protections are constitutionally allowable but that the combination of PBRs and removal protections raises problems. Consider the case of the SEC, a five-member body whose commissioners serve staggered five-year terms, with one term ending in June of every year.¹⁹⁹ Suppose there were no PBR and so a two-term President (say, President Obama) would have opportunities to fill every position on the commission. Assuming that President Obama could get all of his nominees

¹⁹⁴ *Id.* at 492.

¹⁹⁵ Krotoszynski et al., *supra* note 15, at 948.

¹⁹⁶ *Id.* at 991-92.

¹⁹⁷ *Id.* at 1002.

¹⁹⁸ *Id.* at 1005.

¹⁹⁹ 15 U.S.C. § 78d.

confirmed, he would be able to stock the commission with likeminded members during his eight years in office (indeed, by year five). President Trump would then inherit an SEC with five liberal Democratic commissioners. Each June, President Trump would be able to appoint a conservative Republican to the expiring term, but it would not be until June 2019—more than halfway through his firm term—that he could achieve a conservative Republican majority on the SEC.

At least arguably, partisan balance requirements make Presidents *less* “rel[iant] on political enemies” insofar as they ensure that Presidents inherit commissions with only a bare majority of members hailing from the opposite party. In the example above, President Trump would be able to achieve a conservative Republican majority on the SEC the first time that a Democratic-appointed commissioner’s term expires. In an analysis of 12 multimember agencies subject to PBRs, Neil Devins and David Lewis find that following a change in party control of the White House, it takes an average of 13 to 14 months for the new President to obtain a majority of co-partisans on a commission.²⁰⁰ In other words, if historical patterns hold, it will take President Trump an average of 13 to 14 months from inauguration—March or April of 2018—before a majority of commissioners are Republican. By contrast, it takes an average of 26 months for a new President to appoint an absolute majority of members (i.e., until March of 2019 before a majority of commissioners are Trump appointees).²⁰¹

Thus, the extent to which PBRs make a President reliant on commissioners whose ideologies differ from the President’s own views depends critically on whether PBRs actually push Democratic Presidents to appoint conservative Republicans (and, vice versa, whether PBRs actually push Republican Presidents to appoint liberal Democrats). If PBRs impose only a weak constraint, such that a Democratic President can appoint liberals to both Democratic and Republican seats, then it will take longer for a new conservative Republican President to fill a commission with conservatives. If PBRs impose a stronger constraint on ideology, then a new conservative Republican President will be able to assemble conservative majorities on commissions much more quickly. From this perspective, our results should be reassuring to those who worry that multimember agencies subject to PBRs whose members enjoy for-causal removal protection will interfere with the President’s pursuit of his or her policy agenda. As PBRs become increasingly effective at generating ideological diversity on multimember agencies, they may in fact do less to obstruct the sitting President rather than more.

CONCLUSION

Our topline result can be summarized in a single sentence: Since the mid-1990s (but not in the decade and a half before), partisan balance requirements have

²⁰⁰ Devins & Lewis, *supra* note 79, at 470. Devins and Lewis analyze data from the 1921-2005 period.

²⁰¹ *Id.*

shaped the ideological composition of multimember agencies by forcing Presidents to fill cross-party seats with appointees whose preferences diverge from their own. In other words, partisan balance requirements indeed bite, but they have come to do so only relatively recently. These findings are broadly consistent with supply-side developments: as ideology and party identification have become more closely correlated, Presidents have found it more difficult to identify competent cross-party appointees whose policy preferences they share. And as a consequence, the decades-long trend toward partisan sort in American politics has led to multimember boards and commissions comprised of very few cross-party appointees sharing the ideology of the President who appointed them. Democratic Presidents may still be on the hunt for liberal Republicans to appoint to cross-party seats (and Republican Presidents for conservative Democrats), but with fewer of these creatures left in the wild, Presidents increasingly are compelled to select their ideological opponents for cross-party seats.

Our results suggest a novel twist on the standard narrative of partisan polarization. The conventional wisdom holds that increased partisan polarization has strained the architecture of government. At agencies subject to PBRs, however, the effects of partisan sort may be salutary. Partisan sort may lead Presidents to select bona fide cross-party members, who in turn serve as in-house monitors and counterbalance tendencies that might drive groups to go to extremes.

We cannot yet say definitively that PBRs reduce the costs borne by Congress and the courts in watching over multimember agencies. Nor can we confidently say that PBRs improve deliberative processes inside agencies. This study is a first step toward resolving those questions, but it is not a final answer. What we can conclude, based on the data analyzed here, is that PBRs appear to enhance the ideological diversity of multimember boards and commissions throughout the federal bureaucracy. At a time of heightened concerns regarding partisan polarization in Washington and across the country, that in itself is no mean feat.