# ADMINISTRATIVE DISSENTS

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ABSTRACT

*Commissioners, like judges, dissent. They do so at length, with vigor, and with persistence. Yet while separate judicial decisions are the subject of a rich literature, their administrative counterparts have long languished in obscurity. A closer look is warranted, however, because studying administrative dissent can enhance our understanding of internal agency operations as well as the relationships between agencies and other actors. This Article presents the results of an original review of separate statements at the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission dating back four decades. It uses these findings to move beyond two common generalizations about administrative commissions: that commissions act largely by consensus and that the myriad independent commissions across the federal bureaucracy are essentially homogenous. This Article also tells a larger institutional story about the utility of separate statements in constraining bureaucratic discretion. Commissioner dissents and concurrences ameliorate the principal-agent problem inherent in delegations of legislative authority by providing both Congress and the President with better information about the preferences and behavior of individual commissioners. Dissents and concurrences can also improve decision-making quality within the agency, thereby minimizing the risk of*

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*arbitrariness. An emerging judicial doctrine of "deliberation-forcing" as a component of "arbitrary and capricious" review can enhance this effect, and this Article proposes that similar "deliberation-forcing" inform judicial review of agency interpretations of law under* Chevron. *This Article concludes by proposing a framework in which to assess the costs and benefits of separate statements and suggesting avenues for further research.*

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## INTRODUCTION

*"This order ... 'ignor[es] the elephant in the living room.'"*
*—FERC Commissioner Bill Massey, Dissenting in Part*[1]

*"[T]he lessons we learned from the Three Mile Island accident ... seem to have been forgotten by the present Commission."*
*—Separate Views of NRC Commissioner Asselstine*[2]

*"[I]t is sad to witness the FCC's unprecedented attempt to replace ... freedom with government control."*
*—Dissenting Statement of FCC Commissioner Ajit Pai*[3]

The administrative state, with its "vast hallways,"[4] twisted warrens, and dark corners, holds mysteries even for those who inhabit and study it. Scholars have mined the bureaucracy's rich seams for decades, and yet new discoveries are regularly unearthed.[5] This Article sheds light on one such little-studied feature of administrative decision-making: published dissents and concurrences on multimember commissions.

Consider the following examples:

♢ A NRC Commissioner dissented from a broad Final Statement of Policy on Regulation of Advanced Nuclear Power

1. Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 66 Fed. Reg. 15,858, 15,865 (Mar. 14, 2001) (Massey, Comm'r, dissenting in part).

2. Licensing of Nuclear Power Plants Where State and/or Local Governments Decline to Cooperate in Offsite Emergency Planning, 52 Fed. Reg. 6980, 6984 (proposed Mar. 2, 1987) (to be codified at 10 C.F.R. pt. 50).

3. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5921 (2015) (Pai, Comm'r, dissenting) (majority adopting proposed rule).

4. *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

5. *See, e.g.*, Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1791-94 (2015) (noting ways in which the modern rulemaking process deviates from traditional paths); Elizabeth Magill, *Annual Review of Administrative Law—Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860-62 (2009) (identifying the phenomenon of agency "self-regulation," or voluntary constraint of discretion); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782-1803 (2013) (proposing that agencies shield their decisions from presidential oversight through such innovative strategies as institutional coalition-building and variations in policy making form).

Plants, asserting that the policy was inadequately protective of public safety and that the Commission's posture for the past thirty years had been reactive and too deferential to industry.[6]

◊ A FERC Commissioner suggested that the majority's understanding of the statutory phrase "withheld approval for more than 1 year after the filing of an application" as covering cases in which approval is *denied* was contrary to the plain meaning of the statute.[7]

◊ A FCC Commissioner dissented from a Notice of Proposed Rulemaking imposing "net neutrality" requirements because he believed the Commission lacked statutory authority to promulgate the rule.[8]

◊ A FERC Commissioner's dissent from the issuance of a Notice of Proposed Rulemaking on the regulation of fast-responding resources in wholesale markets found the record inadequate to support the Commission's proposal and chastised the majority for not having begun the rulemaking process with a Notice of Inquiry or an Advance Notice of Proposed Rulemaking.[9]

Such formal, public expressions of disagreement on administrative commissions are commonplace. Yet while their judicial counterparts are the subject of a rich literature,[10] administrative

6. *See* Regulation of Advanced Nuclear Power Plants, 51 Fed. Reg. 24,643, 24,247-48 (July 1, 1986) (Asselstine, Comm'r, dissenting) (to be codified at 10 C.F.R. pt. 50).

7. Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440, 69,476 (Nov. 16, 2006) [hereinafter Order No. 689] (Kelly, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pts. 50, 380).

8. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5921 (Pai, Comm'r, dissenting).

9. *See* Frequency Regulation Compensation in the Organized Wholesale Power Markets, 76 Fed. Reg. 11,177, 11,186-87 (proposed Feb. 17, 2011) (Spitzer, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pt. 35).

10. *See, e.g.*, Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990) (recommending greater restraint from judges in issuing separate opinions); Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14-16 (2008) (arguing that judicial dissent can stimulate greater public participation in policy and governance); Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683, 684-85 (1999) (exploring possible constitutional foundations for a judicial right to dissent); Mark Tushnet, Response, *Incentives and the*

dissents and concurrences have largely escaped notice. Even foundational works on independent commissions fail to account for separate statements.[11] Yet separate statements themselves, and the agency procedures that govern them, are no mere quirks of the administrative process. Rather, they are a fundamental feature of agency decision-making.

Given that separate statements are relatively commonplace across agencies, it is puzzling that they have escaped scrutiny. One possible explanation for this oversight is that commissioner separate statements can be difficult to locate. Each agency has its own procedures governing the publication and availability of these statements, and thus visibility varies. But a more likely explanation is that when it comes to administrative dissent, academia's blind spot is simply the latest exemplar of a larger phenomenon: until recently, administrative law scholarship has been outward looking, focusing primarily on the relationship between agencies and other actors. Scholars have been alternately preoccupied with doctrines of judicial

*Supreme Court*, 78 GEO. WASH. L. REV. 1300, 1303-06 (2010) (assessing the effects of anonymous, as well as attributed, dissents and concurrences on the Supreme Court); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1371-77 (1995) (exploring the reasons judges write separately); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1451-75 (2012) (identifying categories of dissent and describing the cost-benefit analysis judges undertake in deciding whether to write a concurrence or dissent).

11. *See, e.g.*, MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); THE CRISIS OF THE REGULATORY COMMISSIONS (Paul W. MacAvoy ed., 1970).

review on the one hand,[12] and presidential control of administrative agencies on the other.[13]

Increasingly, however, contemporary administrative law scholars have turned away from theories of external control to study agencies' internal dynamics. Recent articles have focused, for example, on the role of agency heads in coordinating agency operations,[14]

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12. For a sample of articles on judicial review of administrative action, see generally, for example, Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555 (2011) (exploring the impacts of standards of judicial review on presidential agendas); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005) (arguing for more searching review of the Executive's factual determinations in wartime); Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589 (2014) (advocating more stringent judicial review for agency factual determinations not subject to executive oversight); and Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006) (defending judicially imposed explanation requirements as tools to ameliorate courts' informational disadvantage vis-à-vis agencies).

With respect to *Chevron* deference in particular, or judicial deference to agency interpretations of statutes they are authorized to administer, there are nearly four hundred law review articles available on Westlaw with *Chevron* in their title. Notable efforts include David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (proposing that the level of judicial deference be tailored to the identity of the agency decision maker); Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009) (criticizing *Chevron* for failing to take into account the realities of legislative behavior); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (exploring the scope of *Chevron*'s application); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that *Chevron* deference can be distilled down to a single reasonableness inquiry); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (arguing for a more expansive understanding of when *Chevron* deference is appropriate).

13. *See, e.g.*, Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (discussing the constitutionality of executive oversight of administration); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (arguing that the President has become the dominant political actor vis-à-vis the administrative state); Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (making the case that the President should merely oversee the operation of the administrative state).

More recently, articles on the relationship between the President and the bureaucracy have focused on specific instruments of presidential control, notably the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015); Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016); Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. (SPECIAL EDITION) 135 (2011).

14. *See, e.g.*, Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015).

power allocations within agencies,[15] the effects of partisanship on agency decision-making,[16] internal agency restraints,[17] and the exercise of agency enforcement discretion.[18] These articles have taken an inductive approach, drawing on actual observations about the way agencies operate to formulate broader conclusions about the systems, both political and legal, that govern them.

This Article contributes both to the established literature on external agency constraints and to the growing literature on internal agency dynamics. Administrative dissents and concurrences are worthy of study for several reasons. First, a more complete picture of this practice reminds us that two common generalizations in administrative law—that commissions act by consensus and that the myriad independent commissions are largely homogenous—are simply that: generalizations. The idea of consensus has been bolstered by a tendency, both inside and outside the academy, to refer generally to "the Agency" or "the Commission," labels which suggest unitary actors. In reality, to paraphrase Ken Shepsle's famous observation about Congress, administrative commissions are a "they," not an "it."[19] In looking beyond majority commission opinions, we find a richer world of disagreement and compromise than is visible from without.

A study of separate statements also reminds us that agencies are heterogeneous. Many so-called independent agencies do share common features including, typically, multimember leadership enjoying for-cause removal protection.[20] But studying dissenting and

15. *See, e.g.*, Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).

16. *See, e.g.*, William Kovacic, *Politics, Hyper-Partisanship, and Regulatory Agency Leadership*, 10 GEO. J.L. & PUB. POL'Y 363 (2012).

17. *See, e.g.*, Magill, *supra* note 5.

18. *See, e.g.*, Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016); Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016).

19. *Cf.* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244-45 (1992) (explaining that the idea of legislative intent is incoherent because Congress is composed of individual members with heterogeneous preferences).

20. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 623-30 (1935) (drawing a distinction between executive officers, who may be removed by the President at will, and independent agency commissioners, who enjoy more protections); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 21 (7th ed. 2014) ("[A] so-called independent commission, such as the Federal Trade Commission (FTC), would typically be headed by a set of commissioners rather than by a single administrator.").

concurring opinions at three commissions—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and the Federal Communications Commission (FCC)—revealed stark differences in culture, procedure, and output.[21] For example, while some commissions produce relatively combative dissents, at others, restraint is the order of the day.[22] While some commissions rely on numerous, and publicly available, internal rules to govern the issuance of separate statements, others operate based largely on long-standing norms.[23] And while the patterns of dissent and concurrence at some commissions suggest partisan decision-making, at other commissions politics appear largely irrelevant.[24]

More broadly, separate statements can enlarge our understanding of a fundamental and persistent critique facing administrative governance: the bureaucracy's legitimacy deficit.[25] Administrative law proposes two primary solutions to the legitimacy problem. First, agencies might be disciplined by subjugating them to electorally accountable actors: Congress and the President.[26] By reducing informational barriers between agencies and their political principals, separate statements can increase the effectiveness of such oversight.

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21. For articles discussing some of these idiosyncratic features, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) (suggesting that nontraditional criteria determine the degree of an agency's independence); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784-824 (2013) (cataloging differences among independent agencies); and Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 972-75 (2015) (identifying appointment restrictions and availability of political review as two key indicia of agency independence).

22. *See infra* notes 96-97 and accompanying text.

23. *See infra* Part I.B.1.

24. *See infra* Part I.B.2.

25. *See* Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 589-97 (2014) (describing the administrative state's legitimacy deficit). Some have even attacked the administrative state as unconstitutional. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1-7 (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

26. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 6 (2012) (arguing that the political branches exert greater control over administrative agencies than do the courts); Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186 n.3 (2014) ("[P]olitical accountability ... is the very premise of administrative discretion in all its forms." (omission in original) (quoting Newman v. Apfel, 223 F.3d 937, 943 (9th Cir. 2000)); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) ("Each agency is subject to control relationships with some or all of the three constitutionally named branches.").

But the job of checking agency discretion need not be performed exclusively by external actors. As scholars and courts increasingly acknowledge, independent agencies can be controlled from within as well as from without.[27] In other words, we might compensate for the absence of administrative electoral oversight by submitting agencies to a variety of internal checking mechanisms—some reviewable by courts, some not—to ensure rational decision-making.[28] By modifying their approach to the review of agency separate statements, courts can promote internal agency deliberation, thereby checking arbitrariness from within.

This Article proceeds as follows. Part I is both descriptive and analytical, focusing on broader lessons from original empirical work on commissioner separate statements. That work involved a review of dissents and concurrences from rulemaking decisions at FERC and the NRC over the past four decades. Anonymous interviews with current and former Commissioners and staff at those two Agencies and at the FCC fleshed out the process by which these separate statements are generated and provided context for significant findings. Part I sets out the results of this review in context, explaining the potential for the findings to disrupt existing generalizations about commission consensus and commission homogeneity.

Parts II and III turn to the import of separate statements for administrative law's foundational conundrum: how to check undesirable behavior by unelected bureaucrats. Part II proposes that

27. There is actually nothing novel about the basic premise that agency structure and process, backed up by judicial review, can reduce or even eliminate arbitrary decision-making. Indeed, this was one of the purposes of the Administrative Procedure Act of 1946 (APA), which sought to achieve "reasonable uniformity and fairness in administrative procedures." DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947).

28. Lisa Bressman is a modern champion of this approach, arguing that accountability theory is overblown and that constitutional principles should be understood as primarily concerned about "decisionmaking that reflects narrow interests rather than public purposes." Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1660 (2004). Such decisions are "arbitrary," Bressman argues, because they are inconsistent with principles of good governance. *Id.* at 1660-61; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462-63 (2003) (arguing that we have become too fixated on political accountability and should refocus our efforts on preventing administrative arbitrariness); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 142 (2010) (suggesting that disparate judicial standards for review of agency action be consolidated into a single "reasonableness" standard).

these statements facilitate congressional oversight of administrative commissions, thus mitigating the problem of bureaucratic drift. It also examines the utility of separate statements for presidential monitoring. In Part III, the Article shifts its attention to the role of separate statements in disciplining internal agency decision-making. It argues that courts can enhance such internal mechanisms by showing special solicitude for arguments raised by dissenting commissioners when reviewing agency action under the APA's "arbitrary and capricious" standard.[29] This judicial "deliberation-forcing," Part III concludes, could be expanded to review of agency interpretations of statutory text under *Chevron*.[30]

Justice William Brennan once proclaimed that "[t]he right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."[31] This much seems axiomatic. But it tells us nothing about the extent to which the exercise of that right in any given context is good policy. Part IV therefore proposes a new normative framework for understanding the institutional and societal benefits and drawbacks of commissioner dissents and concurrences. Part V concludes.

## I. UNDERSTANDING ADMINISTRATIVE DISSENT

Judicial opinions dominate academic thinking on the practice of published separate statements. A deep literature has taken judicial dissent as its subject, exploring the normative bases for the practice, and alternately celebrating and criticizing "great dissenters" such as Justices John Marshall Harlan and Oliver Wendell Holmes.[32] By

29. 5 U.S.C. § 706(2)(A) (2012) (explaining that reviewing courts shall hold unlawful any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

30. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 842-43 (1984) (establishing a deferential two-step process for review of agency interpretations of statutes they are authorized to administer).

31. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438 (1986).

32. *See, e.g.*, M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283; Tushnet, *supra* note 10, at 1303-06. Many of these treatments are authored by the judges themselves. Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2235-36 (1996); *see, e.g.*, Michael Boudin, *Friendly, J., Dissenting*, 61 DUKE L.J. 881, 896-99 (2012); Brennan, *supra* note 31, at 435-38; Ginsburg, *supra* note 10, at 134; Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601, 602 (2012); Antonin Scalia, *The Dissenting Opinion*,

contrast, separate statements by *administrative* decision makers have been largely ignored.[33] These dissents and concurrences appear frequently in the published opinions of independent regulatory commissions, in some cases at the same rate as in the courts.[34] Curiously, many appear in rulemaking documents, including final rules. Some even accompany agency guidance.

Published separate statements are not a necessary feature of decision-making, even in those governance systems that permit dissent in other formats. In most civil law countries, for example, judicial decisions on multimember courts are issued as single, unsigned documents.[35] In the United States, legislative dissent may be documented in legislative history but does not accompany the final bill. Presidents may object to aspects of legislation in signing statements, but these too are made available separately.

Administrative commissions follow the Anglo-American judicial practice of issuing written concurrences and dissents and of integrating them into final decisions. The practice can be traced to the earliest days of modern independent commissions. In 1887, the same year that the Interstate Commerce Commission (ICC) was established, Commissioner William Ralls Morrison dissented from an adjudicatory order.[36] It is perhaps unsurprising that the judicial practice of writing separately made its way onto administrative

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1994 J. SUP. CT. HIST. 33, 33-35; Wood, *supra* note 10, at 1448.

33. *But see* Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333 (2010). Ho compared the results of an expert survey asking about FCC Commissioner philosophies, with an analysis of Commission voting records. *Id.* at 335-36. However, Ho did not focus on either the process for generating separate statements or the content of those statements. *See id.* at 344-45.

34. At FERC, for example, the separate opinion rate, averaged over the agency's lifetime, is approximately 3 percent. Data on file with author. This rate is roughly comparable to that on the D.C. Circuit Court of Appeals. *See* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 & tbl.1 (2010) (deriving a dissent rate of approximately 2.99 percent on the D.C. Circuit between 1998 and 2009). Richard Posner, William Landes, and Lee Epstein cite a 2.6 percent dissent rate between 1990 to 2007 on the courts of appeal more generally (the figure is higher when considering only published opinions) and a concurrence rate of 0.6 percent. *See* Wood, *supra* note 10, at 1451 (citing Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Approach*, 3 J. LEGAL ANALYSIS 101, 106-07 (2011)).

35. *See* Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1609 (2005); *see also* MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES, at xiii (2008) (noting countries that ban published dissent in various contexts).

36. *See* Chi. & Alton R.R. Co., 1 I.C.C. 86, 101 (1887) (Morrison, Comm'r, dissenting) ("I dissent from the views of my associates.").

commissions, given that many early members of such commissions, Morrison included, were attorneys by training.[37]

The practice of writing separately is especially unsurprising when it comes to administrative adjudications, which in many ways mirror cases tried in courts. Curiously, however, commissioners also dissent from quasi-legislative issuances (more commonly known as rules). Commissioners from a wide array of government agencies engage in the practice, including members of the FCC, the FERC, the NRC, the Securities and Exchange Commission (SEC), the FTC, and even the Federal Reserve's Federal Open Market Committee (FOMC).[38] Separate statements are appended to proposed[39] and final rules,[40] to early procedural documents such as Notices of Inquiry and Advanced Notices of Proposed Rulemaking,[41] to Grants or Denials of Petitions for Rehearing, and to Orders on Rehearing.[42] Perhaps most surprising of all, commissioners sometimes dissent from interpretive rules and other informal guidance documents (where clarity and uniformity would appear to be paramount).[43]

Notwithstanding the widespread nature of this phenomenon, it has largely escaped academic and professional notice.[44] This Section therefore attempts to dispel some of the obscurity surrounding

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37. *See, e.g.*, *MORRISON, William Ralls, (1824-1909)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001000 [https://perma.cc/U5TS-2LSM].

38. *See, e.g.*, cases cited *infra* notes 237-41.

39. *See, e.g.*, Licensing of Nuclear Power Plants Where State and/or Local Governments Decline to Cooperate in Offsite Emergency Planning, 52 Fed. Reg. 6980, 6984 (proposed Mar. 2, 1987 (to be codified at 10 C.F.R. pt. 50)).

40. *See, e.g.*, Order No. 689, 71 Fed. Reg. 69,440, 69,476 (Nov. 16, 2006) [hereinafter Order No. 689] (Kelly, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pts. 50, 380).

41. *See, e.g.*, Regional Transmission Organizations, Notice of Intent to Consult Under Section 202(a), 63 Fed. Reg. 66,158, 66,160-64 (Nov. 24, 1998) [hereinafter Section 202(a) Notice for Regional Transmission Organizations] (Bailey, Comm'r, concurring in part and dissenting in part).

42. *See, e.g.*, Separate Statement of Comm'r Moeller, dissenting, *attached to* Order Denying Rehearing on Update of FERC's Fee Schedule for Annual Charges for the Use of Governmental Lands, 129 FERC ¶ 61,095 (2009) [hereinafter Order Denying Rehearing, No. RM09-6-001].

43. *See, e.g.*, Regulation of Advanced Nuclear Power Plants, 51 Fed. Reg. 24,643, 24,647-48 (July 1, 1986) (Asselstine, Comm'r, dissenting) (to be codified at 10 C.F.R. pt. 50) (final policy statement).

44. Due to the siloed nature of administrative practice, even commissioners and agency staff are frequently unaware of how the opinion drafting process operates at other commissions.

commissioner separate statements. It does so by taking a close look at the phenomenon at two independent commissions: FERC and the NRC. For each Agency, not only were all commissioner separate statements from rulemaking decisions collected and reviewed, but also the internal procedures governing the drafting, circulation, and publication of those statements were investigated. In addition, this Section incorporates findings from earlier studies of voting behavior at the FCC and from research into the procedures for separate statements at that Agency.[45]

FERC and the NRC were selected for detailed review for several reasons. First, both are energy agencies. Although their mandates and authority are distinct in important ways,[46] the comparison demonstrates the diversity in commission practices and procedures among federal commissions—even those that operate in related policy areas. Second, Daniel Ho has determined that, among independent commissions with rulemaking authority, FERC has one of the highest rates of separate opinions, while the NRC has one of the lowest.[47] This discrepancy tees up important questions about the effect of internal processes on the rates of published separate statements. Third, on the spectrum of regulatory subject matter, energy is considered to be relatively complex, and thus we might expect agencies operating in this area to receive significant deference from

45. A more detailed assessment of the FCC was not undertaken, in part because data on voting at that Commission already exists. *See* Daniel E. Ho, *Congressional Agency Control: the Impact of Statutory Partisan Requirements on Regulation* 8 tbl.1 (Am. Law & Econ. Ass'n Annual Meetings, Paper No. 73, 2007), http://law.bepress.com/cgi/viewcontent.cgi?article=2219&context=alea [https://perma.cc/L3C6-WJWA]; *see also* Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive Debate: An Empirical Critique* 5, 13, 33 (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series, Research Paper No. 06-04, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100125 [https://perma.cc/7EQL-BAM8] (relying on a data set covering thirty-six years of FCC voting to estimate the impact of politics and other factors on commissioner-voting behavior). Nevertheless, the juxtaposition of the FCC's markedly higher output of separate statements is illuminating, if only as a reminder of commission heterogeneity in this area.

46. While both Commissions are responsible for "energy" regulatory activities, their specific jurisdictions as well as their missions and approach are fundamentally distinct. *See* JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 1 (2d ed. 2009); *About NRC*, NRC, https://www.nrc.gov/about-nrc.html [https://perma.cc/DLU5-FWHS].

47. *See* Ho, *supra* note 45, at 8 tbl.1. Ho measured the rates of dissent and concurrence over a period of years for "major" federal independent regulatory commissions. *Id.* at 7-9. Unlike this project, however, Ho did not explore the content of the separate statements themselves.

reviewing courts. I was curious to see if the presence of dissenting opinions in commission orders upset this expectation. Finally, the subject of energy generation, transmission and use has become increasingly politicized, and studying FERC and NRC decision-making promised clues about politicization on the independent commissions responsible for federal energy governance.

The methodology employed was relatively straightforward. For each Agency, decisions since the beginning of operations under their current names were searched, yielding approximately forty years of decisions for each commission.[48] The processes and procedures governing writing and issuances of separate statements were also investigated. Because few accounts of agency practices in this area are available, academic or otherwise,[49] this Part draws on anonymous interviews with current and former commissioners and staff to supplement its descriptions.

This study captured only concurrences and dissents from rulemaking documents (including informal guidance). If the goal is to capture dissent from agency policy making, the focus on rulemaking will necessarily be underinclusive, because agency policy making also takes place via adjudication.[50] However, the narrower focus on rulemaking was elected for two reasons. First, it created a manageable set of orders for review. More importantly, published separate statements in agency rulemakings pose a greater puzzle than do separate opinions in adjudications. Because published separate

48. For FERC, decisions since it began operations as the successor agency to the Federal Power Commission on October 1, 1977, were examined for the presence of separate statements. Decisions from the NRC after it succeeded the Atomic Energy Commission (AEC) on January 19, 1975, were also reviewed.

49. The best comprehensive data on individual commission approaches comes from a seventeen-year-old article by Marshall Breger (a former chairman of the Administrative Conference of the United States) and Professor Gary Edles. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000). Breger and Edles found that most, but not all, commissions permit the issuance of separate opinions. The Equal Employment Opportunity Commission (EEOC) and the National Credit Union Administration (NCUA), for example, do not allow them. *Id.* at 1246-47, 1270-71.

50. Some agencies use adjudicative policy making more than others. The classic example of an agency that relies heavily on adjudication as opposed to rulemaking is the National Labor Relations Board (NLRB), which has largely declined to use rulemaking to make general policy. *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 411-13 (2010).

opinions are common on multimember courts going back to the American judiciary's earliest days (and because issuing seriatim opinions was the modus operandi of English courts dating back nearly a thousand years), it is unsurprising that agency adjudicators adopted the practice.[51] By contrast, as discussed above, concurrences and dissents *attached to quasi-legislative issuances* are without historical precedent, at least in the United States, perhaps due to the need for settlement in the promulgation of prospective general law.

Findings from this review are used in the two Sections that follow to respond to two common generalizations about the administrative state. First, information about the frequency and content of separate statements demonstrates that commission consensus is not pervasive. Next, a description of practices and procedures governing separate statements at the various commissions reviewed counters the idea of independent commission homogeneity.

### *A. The Myth of Agency Consensus*

#### *1. Commissions Are a 'They,' Not an 'It'*

Some of the most disruptive observations in legal and political theory identify features that are hiding in plain sight. Consider Ken Shepsle's famous declaration in 1992 that "Congress is a 'they,' not an 'it.'"[52] Shepsle's thesis was that, given a Congress composed of multiple members with varying preferences, the idea of a single, coherent "legislative intent" is oxymoronic.[53] Commentators committed error, therefore, in treating Congress as an undifferentiated whole rather than as a collective of individual actors.[54] Adrian Vermeule has applied Shepsle's insight to the courts, arguing that theorists "overlook that the judiciary is a collective body, not a single individual."[55] He concludes that this oversight, too, has resulted

51. *See* Henderson, *supra* note 32, at 285 (offering a history of seriatim opinions in English courts).

52. Shepsle, *supra* note 19, at 244.

53. *Id.* at 239.

54. *See id.*

55. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 551 (2005).

in the development of mistaken theories of statutory interpretation or, at least, flawed justifications for those theories.[56]

Commissions, too, are collections of individuals. The insight that commissions are a "they" rather than an "it" has implications for agency accountability, which is the subject of Part II, as well as interpretive theory, which is taken up in Part III. Each of these conclusions, however, hinges on the heterogeneity of commissioner preference. Because agency actors tend to be more circumspect than members of Congress about airing their disagreements in the press, generalizations about consensus are more stubborn in the agency context. The judicial analog may be more appropriate. We know that judges form different opinions about the outcome of individual cases—and that they hold different views about the enterprise of judging more generally—because they tell us so in concurrences and dissents.[57]

At some independent agencies, commissioners write separately at a rate similar to their judicial counterparts.[58] Yet because this feature of commission decision-making has been largely overlooked, the "consensus" assumption debunked in the legislative and judicial contexts persists with respect to administrative commissions. This is surprising, especially considering that commissioners who author separate statements often appear eager for attribution.[59]

Commissioners express separate views nearly as often as judges do (at least on certain commissions). However, rates of dissent vary dramatically by commission.[60] Of the commissions investigated here, the FCC produced the most separate statements,[61] FERC produced a considerable number,[62] and the NRC produced almost none.[63]

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56. *Id.* at 583-84.

57. The fact that the vast majority of judicial decisions are unanimous does not alter our views.

58. *See supra* note 34 and accompanying text.

59. James Landis believed that localization of responsibility with individual commissioners would actually make administrative leadership roles more attractive "for men whose sole urge for public service is the opportunity that it affords for the satisfactions of achievement." LANDIS, *supra* note 11, at 28 (explaining why the multiplication of agencies is desirable).

60. This finding is consistent with the conclusions about commission heterogeneity discussed in Part I.B.

61. *See infra* Part I.A.1.c.

62. *See infra* Part I.A.1.a.

63. *See infra* Part I.A.1.b. As will be discussed in more detail below, however, NRC

Like judicial dissents, commissioner separate statements vary not only in their frequency, but in their tone and target. Some of these statements challenge the legal reasoning or policy underpinnings of majority opinions. Others expose procedural irregularities. Still others allege that commission conclusions are inadequately supported or contain factual errors. The ensuing subsections offer an overview of separate statements at independent commissions through accounts of the practices at FERC, the NRC, and the FCC.

*a. Federal Energy Regulatory Commission*

Congress created the Federal Power Commission in 1920 and granted it the authority to regulate electricity in 1935.[64] The Commission assumed its current name in 1977 following congressional reorganization.[65] FERC is headed by five Commissioners nominated by the President and confirmed by the Senate, no more than three of whom may come from the same political party.[66] The President designates one of the Commissioners to serve as Chair.[67]

The Commission regulates electricity, natural gas, oil pipelines, and hydroelectric facilities (dams).[68] FERC is a busy agency, issuing thousands of orders per year.[69] Perhaps due in part to the volume of work, the Commission's process for issuing decisions, or "orders," is

commissioners have the opportunity to express disagreement earlier in their decision-making process and statements reflecting those differences in view are publicly available.

64. *See History of FERC*, FERC, https://www.ferc.gov/students/ferc/history.asp [https://perma.cc/65YR-4K9E].

65. *See* Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended in scattered sections of 42 U.S.C.).

66. *See* 42 U.S.C. § 7171(b)(1) (2012).

67. *Id.*

68. *See What FERC Does*, FERC, https://www.ferc.gov/about/ferc-does.asp [https://perma.cc/73ME-HKT9].

69. A 1984 General Accounting Office (now Government Accountability Office (GAO)) report found that, all told, "FERC produces about 85,000 decision documents [per] year." U.S. GEN. ACCOUNTING OFFICE, GAO/AFMD-84-8, FERC CAN IMPROVE ITS OPERATIONAL PERFORMANCE BY BROADENING AND DEEPENING CURRENT MANAGEMENT EFFORTS app. I, at 2 (1984). However, many of the decisions in relatively routine matters are delegated to staff. *See id.* ("Most of FERC's total effort goes into processing ... high-volume, relatively standardized requests."). Such routine matters include, for example, minor change in control cases under section 203 of the Federal Power Act. *See Mergers and Sections 201 and 203 Transactions*, FERC, https://www.ferc.gov/industries/electric/gen-info/mergers.asp [https:// perma.cc/Z3VJ-HH2W].

highly centralized.[70] At the same time, the process is relatively informal and is governed by norms and convention rather than published rules.[71]

A review of the separate statements at FERC since its inception yielded several interesting observations.[72] First, the rate of concurrence and dissent (from all decisions, not just rulemakings) was low during the first several years of the Commission's operation, but rose and maintained a relatively consistent level after that. From its creation in 1977 through 1984, the average rate of dissent was 1.44 percent. The rate then rose to a high of approximately 4 percent between 1985 and 1995, before settling back to a rate of approximately 3.25 percent from 2005 through 2014. The growth in rates of separate statements is even more pronounced when only rulemaking issuances are examined.[73] The rate of rulemaking issuances with separate statements has grown steadily from 0.28 percent in the period from FERC's establishment in 1977 through 1985, to a rate of 6.7 percent between 2005 and 2014.

Separate statements by FERC commissioners tended to be short[74] and were largely informal and collegial.[75] Like courts, commissions have their "Great Dissenter[s],"[76] and FERC is no

70. *See infra* Part I.B.1.

71. *See infra* Part I.B.1.

72. Data on file with author.

73. Here, only the number of issuances with separate statements was recorded, regardless of the number of separate statements that appeared in each issuance. A separate statement was counted only once, even if more than one commissioner joined the statement.

74. The exceptions included Commissioner Kelly's dissent from the section 216(b) rulemaking on FERC's authority to override state decisions on siting electricity lines, and Commissioner Moeller's dissent from Order No. 745, which set rates for demand response services in wholesale markets. *See, e.g.*, Demand Response Compensation in Organized Wholesale Energy Markets, 76 Fed. Reg. 16,658, 16,679-82 (Mar. 15, 2011) [hereinafter Order No. 745] (Moeller, Comm'r, dissenting) (to be codified at 18 C.F.R. pt. 35); Order No. 689, 71 Fed. Reg. 69,476 (Nov. 16, 2006) (Kelly, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pts. 50, 380). Each of these lengthier dissents disagreed with the majority's interpretation of statutory language. Order No. 745, 76 Fed. Reg. at 16,679-82; Order No. 689, 71 Fed. Reg. at 69,476. This is perhaps why the Commissioners wrote at greater length: they felt obligated to explain their legal disagreement in full.

75. *See infra* Part I.B.1.

76. The phrase "Great Dissenter" has been used to refer to both Justice John Marshall Harlan and Justice Oliver Wendell Holmes. *See, e.g.*, Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 601 (1994) (arguing that Justice Harlan deserved the moniker more than Justice Holmes).

exception.[77] Commissioners demonstrating a greater propensity to write separately included Commissioners Cheryl LaFleur (D-Obama), Philip Moeller (R-Obama), Suedeen Kelly (D-G.W. Bush/Obama), Jon Wellinghoff (D-Obama), Nora Brownell (R-G.W. Bush), William Massey (D-Clinton), Vicky Bailey (R-Clinton), Elizabeth Moler (D-Reagan), Charles Trabandt (R-Reagan), and Charles Stalon (D-Reagan).[78]

*b. Nuclear Regulatory Commission*

The NRC is the modern incarnation of the AEC, an agency created in the wake of World War II to promote civilian development of nuclear power and to guard against its risks.[79] The Commission assumed its new name in 1975, when Congress shifted its mandate to focus exclusively on nuclear safety.[80] The NRC is composed of five members appointed by the President "with the advice and consent of the Senate," one of whom the President designates as Chairman.[81] No more than three of the Commission's members may be from the same political party.[82]

The Commission licenses and regulates the nation's nuclear power fleet and other uses of nuclear materials. Its approximately 3900 permanent employees dwarf FERC's approximately 1450.[83] Its

77. Even certain members of the FOMC, a Commission in which one would expect consensus to be paramount given its role in setting monetary policy, dissent frequently. *See* Binyamin Appelbaum, *The Great Dissenters*, N.Y. TIMES: ECONOMIX (Jan. 9, 2013, 8:00 AM), https://economix.blogs.nytimes.com/2013/01/09/the-great-dissenters/ [https://perma.cc/HE5Z-CTCV] (identifying three members of the FOMC that had dissented more than eight times in a single year).

78. Commissioners issuing more than three dissenting or concurring opinions were considered to have a greater propensity to dissent than their fellow commissioners, most of whom issued fewer than three dissenting or concurring opinions, and many of whom issued none at all. Data on file with author.

79. *See* J. SAMUEL WALKER & THOMAS R. WELLOCK, A SHORT HISTORY OF NUCLEAR REGULATION, 1946-2009, 1-2 (2010), http://www.nrc.gov/docs/ML1029/ML102980443.pdf [https://perma.cc/D7DN-AYYV].

80. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified as amended in scattered sections of 42 U.S.C.); WALKER & WELLOCK, *supra* note 79, at 51.

81. 42 U.S.C. § 5841(a)(1), (b)(1) (2012).

82. *Id.* § 5841(b)(2).

83. *Compare* OFFICE OF FED. OPERATIONS, EEOC, ANNUAL REPORT ON THE FEDERAL WORK FORCE, FISCAL YEAR 2009 pt. II, at 62 (2009), https://www.eeoc.gov/federal/reports/fsp2009/upload/FY-2009-Annual-Report.pdf [https://perma.cc/EWW9-YY3A] (Workforce Composition: FERC), *with id.* pt. II, at 96 (Workforce Composition: NRC).

budget is larger too: about $1 billion per year to FERC's estimated $320 million in 2016.[84] The NRC's internal rules and procedures are highly formalized.[85] In the opinion of one senior NRC official, this is due, at least in part, to the Agency's recognition of the need for regularity and transparency when dealing with subject matter that causes unease in the general population.

NRC Commissioners publish very few separate opinions in final rulemaking documents. The review identified twenty-one published separate statements from NRC rulemaking decisions.[86] Two decisions contained more than one separate statement, meaning that nineteen unique decisions contained one or more separate statements. Of the twenty-one statements, thirteen were at least partial dissents, while the remainder were concurrences. Interestingly, formal, published separate views do not appear in rulemaking decisions after 1993. In addition, a single commissioner, James Asselstine, was responsible for seven of the twenty-one separate statements, including six dissents and one concurrence.[87]

Despite the dearth of formal separate views, dissenting views and other comments are frequently expressed and considered by the Commission at earlier stages of the policy making process. As described in Part I.B, commissioners may include comments on both procedural and substantive early-stage proposals, and these comments are made public (along with the proposals themselves) on the Commission's website.[88]

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84. *Compare* Press Release, NRC, NRC Proposes FY 2017 Budget to Congress (Feb. 9, 2016), https://www.nrc.gov/docs/ML1604/ML16040A247.pdf [https://perma.cc/65TK-X5QM], *with* FERC, FISCAL YEAR 2017 CONGRESSIONAL PERFORMANCE BUDGET REQUEST, at ii (2016), https://www.ferc.gov/about/strat-docs/2016/FY17-Budget-Request.pdf [https://perma.cc/G2DU-CSDA]. FERC offsets its entire budget through fees recovered from regulated entities. FERC, *supra*; *cf.* Press Release, NRC, *supra* (observing an approximately 90 percent budget offset from licensing fees).

85. *See infra* notes 113-25 and accompanying text.

86. Data on file with author.

87. Commissioner Asselstine served from May 1982 to June 1987. *See James K. Asselstine*, NRC, https://www.nrc.gov/about-nrc/organization/commission/former-commissioners/asselstine.pdf [https://perma.cc/7PCU-SLHJ]. He began his career as an attorney with the AEC and then the NRC and subsequently served as Associate Counsel on the Senate Committee on Environment and Public Works. *Id.*

88. Commissioner comments on earlier-stage decision documents are also included in published Federal Register documents such as proposed rules. However, if the commissioners have not authored a separate concurrence to or dissent from the published rulemaking document itself, these earlier comments are included as part of the procedural history, rather than

As an example, the Commission's draft final rule on licensing criteria for a proposed high-level nuclear waste disposal at Yucca Mountain in Nevada drew separate statements from all four Commissioners sitting at that time.[89] Chairman Meserve and Commissioners Dicus and Merrifield approved of the draft,[90] but each noted that, while the Commission was obligated by statute to incorporate Environmental Protection Agency (EPA) standards into their licensing criteria, they found those standards unnecessary to protect public health.[91] Commissioner McGaffigan went further, calling EPA's groundwater standard "nonsensical" because it required exposure levels below what one might receive in a brick home, in the U.S. Capitol building, on a cross-country flight, or by eating bananas.[92] Commissioner McGaffigan even expressed a hope that the courts would strike the groundwater standard from the final rule.[93] However, none of these statements were appended to the final rule as published in the *Federal Register*.[94]

*c. Federal Communications Commission*

While this project did not undertake an independent review of separate statements at the FCC, some data is available from existing studies. Daniel Ho found that the rate of dissent or concurrence,

being appended to the end of the document, or are absent from the published version. *See, e.g.*, Changes, Tests, and Experiments, 63 Fed. Reg. 56,098, 56,113-15 (proposed Oct. 14, 1998) (to be codified at 10 C.F.R. pts. 50, 52, 72) (reproducing the earlier comments of Chairman Jackson on the underlying staff issue paper approving in part and disapproving in part the staff's proposal for rulemaking).

89. *See* Voting Summary, *attached to* Commission Voting Record on SECY-01-0127, Draft Final Rule: 10 CFR Part 63, "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain Nevada" (Sept. 7, 2001) [hereinafter SECY-01-0127 DFR], http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2001/2001-0127vtr.pdf [https://perma.cc/EWZ7-6ECG].

90. *Id.*

91. Comments of Chairman Meserve on SECY-01-0127, at 1, *attached to* SECY-01-0127 DFR, *supra* note 89; Comments of Commissioner Dicus Regarding SECY-01-0127, at 1, *attached to* SECY-01-0127 DFR, *supra* note 89; Commissioner Merrifield's Comments on SECY-01-0127, *attached to* SECY-01-0127 DFR, *supra* note 89.

92. Commisioner McGraffin's Comments on SECY-01-0127, at 1-2, *attached to* SECY-01-0127 DFR, *supra* note 89.

93. *Id.* at 2.

94. *See generally* Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732 (Dec. 3, 2001) (to be codified in scattered parts of 10 C.F.R.).

over a commission's lifetime, was higher at the FCC than at any of the other independent commissions he studied.[95] In another study, Adam Candeub and Eric Hunnicut concluded that even the FCC Chair, who by virtue of agenda-control will infrequently be in the minority on a given issue, concurred or dissented in 119 of 9279 orders examined.[96]

A review of a small sample of FCC separate statements suggested that the tone of these statements is more combative than those at either FERC or the NRC. Consider, for example, the powerful concurring and dissenting statement of Commissioner Ajit Pai from a Notice of Proposed Rulemaking concerning the transition to all-Internet communications technology: "The Commission would do well to heed th[e] lesson [not to succumb to panic and hysteria] as we move forward in this proceeding .... [I]f we don't, it will be the Commission that is standing in the way of progress that would benefit the American people."[97] This more combative rhetoric, while not atypical at the FCC, was noticeably absent from most concurrences and dissents at FERC and at the NRC.

### *B. The Myth of Agency Homogeneity*

> *"Generalizations as to the organization of administrative agencies are not only difficult but dangerous to make."*[98]

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95. *See* Ho, *supra* note 45, at 8 tbl.1. The other agencies Ho examined were the FTC, SEC, FERC, FEC, Occupancy Health and Safety Review Commission (OSHRC), AEC/NRC, and NLRB. *Id.* Ho's study did not note whether or not these dissents and concurrences were accompanied by separate statements. *Id.* Keith Brown and Adam Candeub reviewed all FCC votes on final orders from 1977 to 2003, a dataset comprising over 8000 orders and decisions. Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 794 (2010). While they found that the vast majority of these decisions were unanimous, their denominator included many routine matters that would be unlikely to attract commissioner attention. *See id.* at 793-95.

96. *See* Adam Candeub & Eric Hunnicutt, Political Control of Independent Agencies: Evidence from the FCC (July 14, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640285 [https://perma.cc/4VJR-NVKA].

97. Ensuring Customer Premises Equip. Backup Power for Continuity of Commc'ns, 29 FCC Rcd. 14,968, 15,040 (2014) (Pai, Comm'r, concurring in part and dissenting in part).

98. CHAIRMAN OF THE S. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 19 (Comm. Print 1960) [hereinafter LANDIS REPORT] (work attributed to James M. Landis).

Generalization is an academic indulgence that assists in the (admittedly important) project of expanding conclusions across domains.[99] But equally important is recognizing the fudges and glosses this move entails. Oversimplification, even when deployed as a helpful tool, can obscure our understanding of what lies beneath.

Administrative law is guilty of such oversimplification. In one of the foundational texts on administrative law, *The Administrative Process*, James Landis notes the "range of administrative agencies" and observes that these agencies are "characterized by an extraordinary diversity of methods and objective[s]."[100] The Supreme Court has also remarked on "[t]he incredible variety of administrative mechanisms in this country."[101] Notwithstanding these observations, bureaucratic diversity has yet to receive the scholarly attention it deserves. Landis suggests why: "In a field such as this," he proposes, "so much rests on surmise that there is a tendency to throw the mantle of universality about the few limited particulars that one can discover."[102]

The problem of administrative overgeneralization can only be remedied by careful work to elucidate administrative variation. Scholars have only recently begun to explore this variation in a serious way.[103] One way to undertake this exploration is to focus on a narrow slice of administrative practice and procedure. That is the approach this Article takes, focusing on heterogeneity in commission approaches to separate statements.

The most obvious way that agencies differ is in their basic design.[104] For much of the administrative state's history, however, the only distinction that received much attention was that between single-head executive agencies, on the one hand, and multimember independent commissions, on the other.[105] Even that distinction

99. The Author is admittedly guilty of such generalization in later Parts, where broader implications of commissioner separate statements for administrative theory and doctrine are discussed.

100. LANDIS, *supra* note 11, at 22.

101. Withrow v. Larkin, 421 U.S. 35, 46, 51-52 (1975) (examining the extent of the right to an impartial decision maker in administrative adjudication); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 520-21 (2010) (Breyer, J., dissenting) (observing that administrative "statutes create a host of different organizational structures").

102. LANDIS, *supra* note 11, at 113.

103. *See* sources cited *supra* note 5.

104. *See, e.g.*, DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 18 (2003).

105. There is no unanimity on the features that make an agency "independent" as opposed

glosses over variations within the category of independent agencies.[106] And some agencies also seem to fall across or beyond these categories. Indeed, Anne Joseph O'Connell argues that these "boundary" institutions are far more central to the bureaucracy than previously acknowledged.[107]

Design distinctions are important. But separate statements, and the process by which they are issued, spotlight another less conspicuous aspect of commission diversity: *procedural* diversity. Agencies that share major design features, such as political insulation and a multimember commission structure, may be strikingly different in terms of their actual operation.[108] Such procedural diversity often escapes judicial notice, since agencies have broad discretion to innovate above the procedural minima set by the Constitution, statutes, and executive orders.[109] Part I.B.1 demonstrates procedural diversity at FERC, the NRC, and the FCC in the context of decision-making and the authoring of separate statements.

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to "executive." *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 603 (2010) (arguing that the varying degrees of independence across agencies "challenge standard accounts of the line dividing independent and executive-branch agencies"). However, few dispute that such a conceptual distinction exists or that, in most cases, it is possible to distinguish between the two in practice. Kirti Datla and Richard Revesz have chronicled some of the features that differentiate independent commissions from one another, with an eye to the impact each of these features has on an agency's relative independence from the political branches. Datla & Revesz, *supra* note 21, at 772.

106. *See* PHH Corp v. CFPB, 839 F.3d 1, 17-21 (D.C. Cir. 2016), *vacated and reh'g en banc granted* Feb. 16, 2017 (discussing several examples of single-headed, independent agencies).

107. *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 851-52 (2014) (identifying agencies that do not easily fit the definitions of "executive agency" or "independent commission"); *see also* Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 777-79 (2013) (characterizing the U.S. energy system under a holistic interaction-based model); Hari M. Osofsky & Hannah J. Wiseman, *Hybrid Energy Governance*, 2014 U. ILL. L. REV. 1, 4-5 (exploring "hybrid" agencies that span the public-private and state-federal boundaries).

108. Even a standard activity such as cost-benefit analysis or making documents available for inspection can vary across commissions. *See* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 460 & n.48 (2014) (discussing variations across commissions); Stephen F. Williams, *The Era of "Risk-Risk" and the Problem of Keeping the APA up to Date*, 63 U. CHI. L. REV. 1375, 1385-86 (1996) (contrasting implementation at the Social Security Administration (SSA) and FERC of the APA requirement that documents be "available for public inspection" (quoting 5 U.S.C. § 552(a)(2) (1994))).

109. *See* Emily S. Bremer & Sharon Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENVTL. L. 523 (2017).

Independent commissions also differ significantly in the degree to which politics affects their decision-making. This was evident after analyzing patterns of separate statement writing at FERC, which displayed none of the stark politicization that has been noted at the FCC. Part I.B.2 sets out this finding in more detail.

*1. Process*

Each of the agencies examined demonstrated a different level of procedural formality when it came to the rules governing opinion writing and, by extension, separate statements. For example, commissions differ in terms of whether—and how—commissioners are given an opportunity to respond to the separate views of other commissioners. The degree of procedural transparency, too, varies by commission.

FERC fell at the least formal end of the spectrum, with a process dictated almost entirely by norm and convention.[110] No written rules or policies, either internal or external, appear to govern Commission rulemaking decisions. At FERC, early written views are not circulated. Instead, Commissioners may express disagreement with a decision draft's approach and/or indicate their intention to write separately at early-stage staff meetings.[111] Compromises to secure commissioner agreement can be made as late as the morning of a vote. During public meetings when the Commissioners come together to vote on their orders, each Commissioner typically offers remarks contextualizing their vote (although this is not required).

After the vote, there is typically a delay in issuing the final order (which may not be ready immediately in any case) to allow Commis-

110. Because FERC's procedures have not been documented in rules or manuals of any kind, this Subsection is based on background conversations with current and former Commissioners and agency staff. Exceptions are noted.

111. The Sunshine Act precludes private meetings involving more than two commissioners. *See* Government in the Sunshine Act, 5 U.S.C. § 552b(a)-(b) (2012). The Act requires that any substantive meetings involving "at least the number of individual agency members required to take action on behalf of the agency" be public. *Id.* § 552b(a)-(d). At FERC, a quorum consists of three commissioners, 16 U.S.C. § 792 (2012), and therefore only two commissioners may meet privately at a time. One former Commissioner noted that he did not believe the Sunshine Act to be a serious limitation on intra-agency communications since it did not impede staff meetings and did not prevent bilateral conversations among commissioners. However, other current and former officials identified it as a considerable constraint on dialogue and compromise among commissioners.

sioners time to append their separate statements to the order.[112] Separate statements are appended to Commission decision documents and are available on the Commission's website, in the *Federal Register*, and through subscription services such as Westlaw and Lexis.[113] These statements appear at the end of the decision document immediately prior to the endnotes.[114]

The NRC's internal decision-making procedures and norms are markedly different from FERC's. The Commission adopts and makes available *Internal Commission Procedures* that cover the Commission decision-making process in considerable detail and include the process for issuing separate statements.[115]

Decision-making at the NRC (including rulemaking) may be initiated by the Chair, by the Commission as a whole, or by senior staff.[116] Because, as at FERC, NRC Commissioners may not meet privately in groups larger than two,[117] they often communicate in written form. Decisions may be initiated by the circulation of staff issue papers (SECY papers), memoranda from individual commissioners recommending a course of action (COMs), or responses to memoranda from staff containing recommendations or seeking Commission guidance (COMSECYs).[118]

The results of any votes taken in written form are recorded in a "Staff Requirements Memorandum" (SRM),[119] which reflects the position taken by a majority of NRC Commissioners.[120] Any sub-

112. However, separate statements may be issued later if necessary. Commissioners typically use their own staffs to help with drafting those statements. *See also* LANDIS REPORT, *supra* note 98, at 19.

113. *See Decisions & Notices*, FERC, https://www.ferc.gov/docs-filing/dec-not.asp [https://perma.cc/JH2K-DWTK].

114. *See, e.g.*, Frequency Regulation Compensation in the Organized Wholesale Power Markets, 76 Fed. Reg. 11,177, 11,186-87 (proposed Feb. 17, 2011) (Spitzer, Comm'r, dissenting) (to be codified at 18 C.F.R. pt. 35).

115. *See generally* NRC, INTERNAL COMMISSION PROCEDURES (2016) [hereinafter NRC PROCEDURES]. These rules prescribe each step of the process down to the colored bands at the top of each internal circulation as well as the procedures for altering those colors. *Id.* ch. II, at 2.

116. *See id.* ch. II, at 1.

117. *See supra* note 111.

118. *See* NRC PROCEDURES, *supra* note 115, ch. II, at 1. A response to COMSECYs is relatively informal and typically occurs via an electronic response sheet circulated along with the SECY. *Id.* ch. II, at 6.

119. *Id.* ch. III, at 1.

120. *Id.* ch. III, at 3.

sequent substantive revisions of the SRM are circulated to the full Commission for a two-day review period, and any comments generated during this process are themselves circulated to each Commissioner.[121] A final SRM is then generated based on the views of a majority of the Commission.[122] Separate views are included in the Commission Voting Record (CVR), which is made public on the Commission's website.[123]

NRC Commissioners thus have several opportunities to note disagreements on the record prior to the culmination of the internal decision-making process. Commissioners may also have their separate views appended to *Federal Register* notices, so long as this intention is expressed in the NRC Commissioner's response to the draft SRM.[124] This earlier circulation allows Commissioners the opportunity to consider each other's positions,[125] and each Commissioner may submit responses for inclusion in the *Federal Register*.[126]

In the final document, separate statements, called "separate views," typically appear in the middle of published decisions, right before various regulatory compliance statements.[127] For this reason, they are somewhat difficult to locate unless a reader knows what to look for or is perusing the decision document in its entirety.

The FCC's processes fall somewhere between FERC's and the NRC's in terms of formality and detail.[128] While internal guidelines exist, these guidelines are not binding nor are they publicly available. At the FCC, some votes are cast electronically, others at public meetings. In each case, forms are circulated with boxes to be

121. *Id.*

122. *Id.* ch. III, at 5.

123. *Id.* ch. III, at 12. Individual commissioners may make their own vote, as well as any comments, public even before the SRM and CVR are made public. *See id.* ch. III, at 5. However, the rules state that a "Commissioner should inform ... his or her fellow Commissioners promptly" if he or she elects this option. *Id.*

124. The requirement that any separate statement be included in the response to the draft SRM is designed to ensure that the other Commissioners are afforded the opportunity to consider the separate views. *See id.* ch. III, at 6.

125. *See id.* ch. III, at 4, 6.

126. *Id.* ch. III, at 6.

127. *See, e.g.*, Changes, Tests, and Experiments, 63 Fed. Reg. 56,098, 56,115 (proposed Oct. 14, 1998) (Diaz, Comm'r, commenting on SECY-98-171) (to be codified at 10 C.F.R. pts. 50, 52, 72).

128. As with FERC, because the FCC's processes have not been documented in rules or manuals, this Subsection relies on background conversations with current and former Commissioners and agency staff.

checked if the Commissioner intends to author a separate statement. At public meetings, each Commissioner will typically make an oral statement regarding the matter to be voted upon. One FCC insider noted that these meetings have become less deliberative and more performative over time. If an FCC Commissioner is not going to approve of a decision across the board, a separate statement is expected. These separate statements are circulated by e-mail to the Commission once voting is complete. Any ensuing edits to statements are themselves circulated in an iterative process to ensure that other Commissioners have an opportunity to respond.

The FCC process is not without its critics. According to one Commission insider, while changes to Commission decisions are circulated prior to a vote, the source of those changes is not necessarily identified. Furthermore, when Commissioners propose changes to the text, there is no obligation for other Commissioners to respond.[129]

### *2. Partisanship*

Commissions are also heterogeneous when it comes to politicization. The original understanding of agencies in general and independent commissions in particular was that they were to lie "outside the proper sphere of politics."[130] Instead, they were designed to be impartial bodies of experts.[131] Nevertheless, more

129. Thus, while majority Commissioner changes are typically incorporated into the final document, this is not true of minority Commissioner suggestions. A Commission insider noted that this is perhaps due to the assumption that minority Commissioners will be unwilling to vote for the decision in any case, and thus are likely to write separately. If true, however, this feature of the process robs separate statements of many of their benefits in terms of improving decision-making substance. *See infra* Part IV.

130. *See* Woodrow Wilson, *The Study of Administration*, 56 POL. SCI. Q. 481, 494 (1941) (emphasis omitted); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (explaining that independent commissions were intended "to be non-partisan" and "to exercise the trained judgment of a body of experts 'appointed by law and informed by experience'" (first citing Ill. Cent. R.R. v. Interstate Commerce Comm'n, 206 U.S. 441, 454 (1907); and then citing Standard Oil Co. v. United States, 283 U.S. 235, 238-39 (1931)); PHH Corp. v. CFPB, 839 F.3d 1, 13 (D.C. Cir. 2016) (noting that the early independent commissions "were designed as non-partisan expert bodies that would neutrally and impartially issue rules, bring law enforcement actions, and resolve disputes in their respective jurisdictions").

131. *See* BERNSTEIN, *supra* note 11, at 36 ("The Progressives had an abiding faith in ... the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."); *see also*

than half of the existing independent commissions have partisan balance requirements,[132] indicating that *potential* partisanship, at least, was of concern to the Congresses that created them.[133] And there is little doubt that Presidents seek to appoint commissioners whose views align with their own,[134] primarily to exercise control,[135] but also, perhaps, to return favors to political patrons.[136]

But does this mean that the commissioners themselves, once appointed, behave as partisan actors?[137] Commissioner separate

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*Humphrey's Ex'r,* 295 U.S. at 624 (upholding removal restrictions for independent commissioners, in part, because "the commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality").

132. *See* Datla & Revesz, *supra* note 21, at 797 tbl.4 (identifying partisan balance requirements at the Consumer Product Safety Commission (CPSC), FERC, Federal Labor Relations Authority (FLRA), Federal Maritime Commission (FMC), FTC, Independent Payment Advisory Board (IPAB), Merit Systems Protection Board (MSPB), National Mediation Board (NMB), NRC, National Transportation Safety Board (NTSB), Postal Regulatory Commission (PRC), Surface Transportation Board (STB), United States Postal Service (USPS), and the Commission on Civil Rights, among others).

Partisanship requirements are typically justified as a restraint on presidential influence. *See, e.g.*, *id.* at 798. The requirements may also avoid ideological excess. *Cf.* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 (1999) (proposing that no more than two judges on any three-judge federal appeals court panel be from the same political party).

133. *See* BERNSTEIN, *supra* note 11, at 26 ("[T]he requirement of bipartisan membership was regarded as an important guarantor of impartiality."); *see also id.*at 25 (noting that one concern in establishing the ICC was that "the bipartisan requirement would impose political bias upon the commission"). *But see* Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 963 (1971) ("It is not bipartisanship as such that is important; it is rather the safeguards and balanced viewpoint that can be provided by plural membership.").

134. *See, e.g.*, DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 27-28 (2008); Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 200 (1982) (elaborating upon the relationship between presidential administration and commission decision-making); *cf.* Jeffrey E. Cohen, *Presidential Control of Independent Regulatory Commissions Through Appointment: The Case of the ICC*, 17 ADMIN. & SOC'Y 61, 69 (1985) (concluding, based on a study of ICC decisions over twenty years, that presidential influence through appointment is illusory and merely represents the shared attitudes of commissioners and the President).

135. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 237-39 (John E. Chubb & Paul E. Paterson eds., 1985) (arguing that because Presidents tend to be held accountable for the functioning of the bureaucracy, they assert control, in part, by politicizing the bureaucracy).

136. David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 PRESIDENTIAL STUD. Q. 60, 63-67 (2009).

137. Several studies suggest that they do. *See, e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 460-61 (2008) (citing increasing party polarization in general as an explanation for

statements shed light on whether politics plays a significant role in commission decision-making.[138] While the data on separate statements provide no basis for disputing the phenomenon of partisan *appointments*, they do suggest that not every independent commission has experienced an increase in partisan *decision-making*. Studies that claim to have found partisanship in independent commission voting patterns have focused their attention on a single agency: the FCC.[139] These findings are consistent with the experience of Commission insiders. One insider noted, for example, that during their tenure at the Agency, there was no perceived downside for minority commissioners to dissent, while majority commission-

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increasing polarization on independent commissions); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 801-02, 805-06 (1991) (finding evidence of successful political control at seven regulatory commissions (both executive and independent) by reviewing enforcement activity over time). From a review of more than forty years of FCC decisions, Daniel Ho finds that commission partisanship may affect policy—perhaps substantially. *See* Ho, *supra* note 45, at 3-4 (reviewing dataset of published adjudications and rulemakings from the FCC from 1965-2006).

If commissions have become more partisan over time, one explanation may be that members of Congress have increasingly delayed commissioner nominations, forcing Presidents to submit compromise "slates" of candidates consisting of majority-party commissioners as well as minority-party commissioners "committed to the agenda of the opposition party." Devins & Lewis, *supra*, at 460-61. This phenomenon has also been referred to as "batching." *See id.* at 489; Ho, *supra* note 45, at 3-4 (identifying a pronounced increase in the number of "batched" appointments).

138. Examination of commissioner-voting records cannot provide a definitive answer to questions about politicization, since, among other problems, disentangling partisanship from ideology is exceptionally difficult. *See* Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 817 (2010). Nevertheless, even the identification of correlations (and especially their absence) can produce some insights. *See id.* at 816 & n.9. And because commissioner separate statements, like their judicial counterparts, tend to be less guarded in tone and expression than majority opinions, they offer more insight into the policy priorities of individual commissioners. *See, e.g., infra* notes 171-72 and accompanying text.

139. Daniel Ho's study of voting behavior at the FCC from 1965-2006, for example, found a strong correlation between party affiliation and the voting behaviors of forty-six different FCC commissioners, even when the party of the appointing President was held constant. Ho, *supra* note 45, at 26 fig.7, 35; *see also* Brown & Candeub, *supra* note 95, at 809 (contending that independent agencies prioritize congressional concerns over presidential interests); Brown & Candeub, *supra* note 45, at 22 tbl.2 (finding that FCC commissioners of the same party as the Chair tend to vote with the Chair more frequently than do other commissioners); Candeub & Hunnicutt, *supra* note 96, at 9-10 (finding increased party-line voting on the FCC during periods of divided government).

ers were more reticent to express disagreement with their party's chair.[140]

At the FCC, therefore, party may be a strong predictor of voting behavior.[141] On other commissions, however, political party appears to be a less salient factor in commission decision-making.[142] A breakdown of FERC separate statements by commissioner party offered support for what many commission insiders have claimed all along: that pure partisanship does not play a significant role in FERC's decision-making.[143] Votes on this Commission simply do not split cleanly along party lines.[144]

This observation is true notwithstanding the fact that FERC's work has become increasingly politicized as environmental outcomes have become more closely identified with energy decision-making. This focus on environmental impacts pits (typically left-leaning) environmental advocates against the (typically right-leaning) fossil fuel industry.[145] Recently, the Commission's headquarters at 888 First St., N.E. in Washington, D.C., was a target for protesters concerned about the approval of pipeline infrastructure that could facilitate natural gas development.[146] Nevertheless, the data on separate statements does not reflect increased partisanship in FERC rulemaking.

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140. *See supra* note 129.

141. *See* Ho, *supra* note 45, at 3-4 ("[T]he effect of commissioner ideology on voting is profound.").

142. *See id.* at 7-11.

143. Former FERC Commissioner Marc Spitzer has publicly opined that 99.9 percent of Commission business is neither particularly controversial nor particularly partisan. Monica Trauzzi, *Former Commissioner Spitzer Discusses Politics of Senate Confirmations, Impact on Commission*, E&E NEWS: ONPOINT (July 17, 2014), http://www.eenews.net/eenewspm/stories/1060003079 [https://perma.cc/6V3C-YZRA].

144. *See id.* ("[T]he FERC has done a very good job paying attention to th[e] issues and not allowing the political noise to somehow disconcert them or make them less effective.").

145. This is an oversimplification. Nevertheless, one might expect to see at least a softer version of political influence on commissioner behavior in increasingly partisan times. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8-9 (2009) (distinguishing between legitimate political influences and "raw politics or partisan politics," and arguing that the former, but not the latter, can legitimately inform agency decision-making).

146. In May 2016, FERC took the unprecedented step of closing its monthly meeting to the public, citing safety concerns. Michael Brooks, *Pipeline Protesters Force FERC to Close Monthly Meeting*, RTO INSIDER (May 19, 2016), https://www.rtoinsider.com/ferc-closed-open-meeting-26581/ [https://perma.cc/HZY3-SEAS].

The NRC provides another useful counterpoint to suggestions of independent commission partisanship. At the NRC, separate statements from final decisions are rare.[147] On its own, this fact suggests a marked absence of partisanship on the Commission. Nevertheless, allegations of Commission partisanship have been rampant in recent years, especially after the appointment of Gregory Jaczko as Chairman in 2009.[148] These allegations stem largely from the Commission's role in studying Yucca Mountain, Nevada, as a possible permanent repository for nuclear waste.[149] Some saw the appointment of Jaczko, a former staffer for project opponent Senator Harry Reid (D-Nev.), as a blatantly political move.[150] But allegations of commission partisanship may have been overblown. The debate over whether Yucca Mountain should be used as a long-term repository for nuclear waste may indeed have divided the Commission, but it is not clear that the divisions were along political lines. Indeed, reports suggest that some of the strongest support for continuing work on the Yucca Mountain project came from Commissioner William Magwood, a Democrat like Chairman Jaczko.[151]

There are good reasons to desire diversity, broadly defined, on independent commissions. If the lessons about agency heterogeneity in this Section have taught us anything, however, it is that diversity means different things on different commissions. There is no good reason, therefore, to think that partisanship is a good proxy for diversity in all cases.[152]

Even at agencies such as FERC, where the data on separate statements suggest that partisanship does not drive decision-making, those statements can still provide useful information about what

147. *See* Ho, *supra* note 45, at 8 tbl.1 (demonstrating a lesser rate of concurrences and dissents in the NRC relative to other independent federal agencies).

148. *See* H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 112TH CONG., A CRISIS OF LEADERSHIP: HOW THE ACTIONS OF CHAIRMAN GREGORY JACZKO ARE DAMAGING THE NUCLEAR REGULATORY COMMISSION 14-16 (2011), https://oversight.house.gov/wp-content/uploads/2012/02/12-13-11-NRC-Report-Final-1.pdf [https://perma.cc/K9XA-NZY3].

149. *See generally id.* at 15-20.

150. *Id.* at 16.

151. *Id.* at 17-20.

152. For a judicial analog, consider the recent comments of Justice Sonia Sotomayor that the Supreme Court is insufficiently diverse when it comes to educational background, religion, and geographic origin. Adam Liptak, *Sonia Sotomayor and Elena Kagan Muse over a Cookie-Cutter Supreme Court*, N.Y. TIMES: SIDEBAR (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supreme-court.html [https://perma.cc/H9CH-F8GD].

*other* factors may account for voting patterns. Indeed, the substance of separate statements suggests that policy differences that align less closely with political party have driven—and continue to drive—disagreements at FERC. While more research is needed to determine which divisions are most salient, the content of commissioner separate statements suggests that three policy dyads explain dissenting behavior at FERC. First is what may be broadly described as the centralization/regionalization dyad. In a separate dissent from Commission rules setting nationwide policy for wholesale markets, for example, Commissioner James Moeller expressed support for allowing regional wholesale markets to set their own prices and rules rather than having them imposed by FERC.[153]

Second is the state/federal authority dyad. The Federal Power Act divides authority over electricity and natural gas between state public utility commissions and FERC.[154] Decisions made at the federal level, even those that do not infringe on state *legal* rights, may still impose policy restrictions on state governments. Some Commissioners appear to be more concerned about this than others. For example, Commissioner Linda Breathitt, a former chair of the Kentucky Public Service Commission (and who again served on that Commission after leaving FERC), issued a separate statement from a Commission order initiating a consultation process with the states on the establishment of Regional Transmission Organizations (RTOs).[155] Commissioner Breathitt applauded the initiation of the consultation process, but expressed concern that state officials were not being asked to weigh in on some of the more fundamental questions of RTO design.[156]

Finally, greater sympathy with either energy producers or energy consumers may drive voting behavior on the Commission. Commis-

153. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,972-74 (Oct. 11, 2011) (Moeller, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pt. 35). Commissioner Cheryl LaFleur also spoke out in favor of regional flexibility. *See, e.g.*, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 64,890, 64,903-04 (Nov. 23, 2012) (LaFleur, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pt. 35); Integration of Variable Energy Resources, 77 Fed. Reg. 41,482, 41,546 (Sept. 11, 2012) (LaFleur, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pt. 35).

154. *See* 16 U.S.C. § 824(a) (2012).

155. *See* Section 202(a) Notice for Regional Transmission Organizations, 63 Fed. Reg. 66,158 (Nov. 24, 1998).

156. *Id.* at 66,164-65 (Breathitt, Comm'r, concurring).

sioner John Norris, a former Iowa Utilities Board Commissioner and former Chief of Staff to Iowa Governor Tom Vilsack,[157] demonstrated his propensity for consumer protection when he dissented from an order on mandatory reliability standards because the Commission's process had failed to give sufficient weight to the costs such standards impose on consumers.[158]

While it remains to be determined precisely how each of the above dyads drives FERC decision-making, what is clear is that each can account for dissenting behavior in a way that partisanship alone cannot. This finding has implications for agency design. Most independent commission organic statutes require that no more than a simple majority of commissioners come from the same political party, but other types of diversity are not typically required.[159] Especially on commissions where partisanship is not driving decision-making, policymakers would do well to consider whether requiring other types of diversity on commissions may better ensure balanced decision-making.

## II. DISSENT'S ROLE IN FACILITATING POLITICAL OVERSIGHT

The last Part's goal was largely descriptive, setting out findings from a review of separate statements and the process by which they are generated at FERC, the NRC, and the FCC. This Part turns to implications of that research for some of the foundational questions in administrative law. We begin with the question of external oversight. Separate statements can ameliorate, at least partially, some of the problems endemic in external monitoring of the bureaucracy.

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157. *U.S. FERC Commissioner Jim Norris to Leave Energy Regulator*, REUTERS (Aug. 7, 2014, 6:04 PM), http://www.reuters.com/article/us-usa-ferc-norris-idUSKBN0G72H020140807 [https://perma.cc/96HQ-S4MG]; *see* Hannah Northey, *Once Indispensable to Powerful Pols, FERC Commissioner Navigates Power Politics*, E&ENEWS: GREENWIRE (Apr. 15, 2013), https://www.eenews.net/greenwire/stories/1059979485 [https://perma.cc/SPL4-38J3] (noting Norris "served as chairman of the Iowa Utilities Board").

158. Transmission Planning Reliability Standards, 77 Fed. Reg. 26,686, 26,696-97 (Apr. 19, 2012) (Norris, Comm'r, dissenting in part and concurring in part) (to be codified at 18 C.F.R. pt. 40).

159. For a list of commissions with partisan balance requirements, see Datla & Revesz, *supra* note 21, at 797 tbl.4. A few commissions do have additional commissioner requirements. For example, the Federal Reserve Board must be appointed with "due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." 12 U.S.C. § 241 (2012).

Independent commissions in particular have been at the center of a literature that alternately questions and condones the insulation of regulatory policy making from political control.[160] But few would argue that independent commissions should be immune even from *monitoring* by Congress and the President.[161] Making agencies accountable to their political overseers, and by extension to the public, requires that there be some reliable mechanism for observing agency decisions and behavior. By making commission decision-making more transparent and revealing the preferences of individual commissioners in a way that unsigned majority documents do not, separate statements can facilitate oversight of commission actions more generally and of individual commissioner behavior.[162]

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160. For articles more sympathetic to agency insulation, see, for example, Barkow, *supra* note 21, at 17-18 (proposing design elements that can make an agency more independent from political pressure); and Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1825-27 (2010) (arguing for greater agency independence that permits broad responsiveness to the public but insulates agencies from populist shocks). The critique of agency insulation from politics has mostly focused on independent agencies' potentially greater susceptibility to interest-group capture. *See, e.g.*, BERNSTEIN, *supra* note 11, at 128-30; *see also* Rodriguez, *supra*, at 1824-25 (arguing that the issue is not so much one of insulation from politics as a choice between political overseers).

161. Those who find independent agencies both constitutional and desirable typically agree that *some* democratic checks are warranted. *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 245 (1987). By enhancing those checks, separate statements thereby enhance the legitimacy of independent commissions. For those more skeptical about the administrative state's inherent legitimacy, improving oversight can still help to mitigate concerns about administrative absolutism.

162. Here, I put to one side some of the problems with overaccountability identified by Gersen & Stephenson, *supra* note 26, at 188, except to note that commissioner separate statements may mitigate some of the pathologies they identify in that they may help political principals accurately identify commissioners as either public-spirited or captured. *See id.* at 190-91. In fact, separate statements might aid in what Jacob Gersen and Matthew Stephenson call the "third-party oversight" solution, in which a secondary agent polices the behavior of a first agent. *See id.* at 213. Gersen has elsewhere suggested that a situation in which agents compete may ameliorate the principal-agent problem. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212-13. Intracommission checking may function in a similar way to interagency checking, with Congress able to incentivize faithful behavior by playing commissioners against one another. *See id.*

### *A. Congressional Oversight*

Positive political theorists define the central dilemma in legislative delegations to administrative agencies as a principal-agent problem.[163] Congress delegates tasks to these commissions via legislation. So far so good. But how can Congress ensure that commissions remain faithful to its wishes?[164] Mechanisms of congressional control are many and varied.[165] They include Senate confirmation of the President's nominees, control over the agency's statutory mandate, oversight and the committee system, the appropriations process, and less formal contacts through congressional liaisons.[166]

The effectiveness of most, if not all, of these tools depends on access to good information about agency behavior, and Congress has limited resources available to monitor agency implementation of its directives.[167] Separate opinions ameliorate the principal-agent problem by reducing Congress's informational disadvantage vis-à-vis the agency.[168] They provide a valuable source of information about the priorities and preferences of individual commissioners. They may report on "unfaithful" behavior by other agency actors (typically other commissioners). Commissioners may even use their separate

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163. *See, e.g.*, Gersen, *supra* note 162, at 211-16 (analyzing jurisdictional assignment as a tool for managing the principal-agent problem); Gersen & Stephenson, *supra* note 26, at 185-87 (noting the pervasiveness of the principal-agent problem); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433-35 (1989); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1388-89 (2011) (proposing a standard for review of agency delay that focuses on the initial delegation to the agency).

164. *See* JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 1-3 (1964) (defining "legislative control" as a determination of "whether legislative policies are being faithfully, effectively, and economically carried out").

165. For an overview of congressional oversight of the bureaucracy, see MASHAW ET AL., *supra* note 20, at 174-192.

166. *See, e.g.*, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990). Others have suggested constituency service as a technique of oversight, in that it often entails direct contact between congressional staff and an agency on behalf of a constituent. *See, e.g.*, John R. Johannes, *Casework as a Technique of U.S. Congressional Oversight of the Executive*, 4 LEGIS. STUD. Q. 325, 325-26 (1979). This direct contact provides an opportunity to observe agency operations on the ground, and to collect information about what is working and what is not. *See id.*

167. McCubbins et al., *supra* note 161, at 243.

168. *See id.* at 247 ("The crime of runaway bureauracy requires opportunity as well as motive, and this is supplied by asymmetric information.").

statements to communicate directly with Congress.[169] Each of these points will be explored in turn.

First, separate opinions offer specific information about individual commissioners and their policy priorities. It is often difficult (if not impossible) to derive this information from unsigned majority opinions issued by a commission, as those decisions reflect collective, rather than individual, commissioner views.[170] Separate statements, on the other hand, are signed, and thus their sentiments may be directly attributed to their authors. In addition, as in the judicial context, those sentiments are often less guardedly expressed. Consider FCC Commissioner Glen Robinson's full-throated dissent from an FCC opinion rejecting a media group's challenge to the Commission's comparative licensing process.[171] In that dissent, Commissioner Robinson characterized the process as "the FCC's equivalent of the Medieval trial by ordeal."[172]

Second, commissioners writing separately sometimes accuse their fellow commissioners of actions or understandings that are inconsistent with congressional preferences. For example, in one dissent, FERC Commissioner Suedeen Kelly labeled the Commission's decision to review contract modifications under a permissive "public interest" standard as "an abdication of the statutory authority and obligations entrusted to the Commission by Congress ... contrary to the will of Congress."[173] These accounts might allow Congress to distinguish between undesirable (from their perspective) policy outcomes that are the result of external factors and those that are the result of commission error or commissioner activism. That information might, in turn, facilitate the investigation or even sanction of individual commissioners.

In addition, commissioners may point Congress to procedural irregularities in commission decision-making. Consider Commissioner Marc Spitzer's dissent from a FERC Notice of Proposed Rulemaking

169. One source confirmed that commissioners do indeed intend to speak directly to Congress in some separate statements.

170. *Cf.* Henderson, *supra* note 32, at 313-15 (describing the compromise necessary after John Marshall replaced the Supreme Court's seriatim practice for a single-voiced Court).

171. *See* Cowles Fla. Broad., Inc., 60 F.C.C.2d 371, 421-23 (1976).

172. *Id.* at 443 (Robinson, Comm'r, dissenting).

173. Standard of Review for Modifications to Jurisdictional Agreements, 71 Fed. Reg. 303, 306 (proposed Dec. 27, 2005) (Kelly, Comm'r, dissenting) (to be codified at 18 C.F.R. pts. 35, 370).

on compensation for frequency regulation in wholesale power markets, in which he expressed concern about the limited input from "traditional" frequency resources such as pumped-hydro storage facilities.[174] Or consider a critique from FERC Commissioner Philip Moeller, dissenting from an Order Denying Rehearing from a Commission decision updating its charges for the use of government land by hydroelectric projects, in which he criticized the Commission's failure to seek public input on fee assessment, a failure he claimed "reduces confidence in the fairness of government process."[175]

Whether they provide information about commissioner preferences more generally or identify potential violations of legislative priorities, separate statements can serve as "fire-alarms," alerting legislators to shirking or bureaucratic drift.[176] While McCubbins and Schwartz anticipated that alarms would be raised by individuals or interest groups, commissioner separate statements can also serve as either intentional or unintentional alerts to members of Congress.

Even if members of Congress are not monitoring commission issuances for the presence of dissent, commissioner separate statements show up in news feeds and thus may be easily captured by congressional staff.[177] Consider the following headlines from the last few years:

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174. Frequency Regulation Compensation in the Organized Wholesale Power Markets, 76 Fed. Reg. 11,177, 11,186-87 (proposed Feb. 17, 2011) (Spitzer, Comm'r, dissenting in part) (to be codified at 18 C.F.R. pt. 35).

175. Separate Statement of Comm'r Moeller, dissenting, at 2, *attached to* Order Denying Rehearing, 129 FERC ¶ 61,095 (2009).

176. Mathew McCubbins and Thomas Schwartz proposed that Congress oversees administrative policy by relying on "fire-alarms," or reports of administrative misdeeds by individuals and interest groups, rather than by sampling administrative behavior on an ongoing basis to discover violations of legislative goals. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); *see also* Barkow, *supra* note 21, at 41 (concluding that commissioner dissents can "serve[ ] as a 'fire alarm' that alerts Congress and the public at large that the agency's decision might merit closer scrutiny").

177. Joel Aberbach found that staff monitor the bureaucracy, in part, via news publications, including specialized media known as trade press. ABERBACH, *supra* note 166, at 87 (reporting survey results).

◊ *Commissioner Moeller Dissents from FERC Decision Granting Waiver of ISO-NE Auction Rules*[178]

◊ *Republican FCC Commissioners Dissent Over Simple Mechanism in CVAA Rule*[179]

◊ *SEC Commissioner's Dissent May Signal Harsher Sanctions Against Accountants*[180]

Each of these headlines could show up in the trade press monitored by members of Congress and their staffs, especially if a member were particularly interested in that issue area at the time.[181]

Separate statements may be most effective as "fire alarms" when they are limited in their frequency. If they occur too regularly, they may become mere background noise. To provide effective signaling, therefore, separate statements must be rare enough that the other branches will take note when they occur.[182] Members of Congress do take note of commissioner separate statements. Recently, in her attack on a rule on bank collateral, Senator Elizabeth Warren (D-Mass.) cited Commodity Futures Trading Commission (CFTC) Commissioner Sharon Bowen's dissent with approval.[183] Similarly, in 2011, Senator Kelly Ayotte (R-N.H.) drew on a dissent by FCC

178. Marcy Crane, SNL ENERGY POWER DAILY, Sept. 4, 2015.

179. WASH. INTERNET DAILY, May 22, 2015.

180. Stephen G. Stroup, NAT'L L. REV. (Sept. 4, 2014), http://www.natlawreview.com/article/sec-commissioner-s-dissent-may-signal-harsher-sanctions-against-accountants [https://perma.cc/ 6JM7-FA37].

181. Often, congressional staff facilitate oversight. *See* ABERBACH, *supra* note 166, at 80 (noting that, for committees at least, "professional staff are [the] eyes and ears ... in ... relations with the bureaucracy"). Regardless of which individuals actually conduct oversight, however, commissioner separate statements provide a lower-cost monitoring target. There is no reason to think that the information contained in those statements provides a less accurate representation of commissioner views than those obtained, for example, via informal contacts which Aberbach acknowledges offer "an incomplete view of the executive world, one most favorable to [the contact's] particular interests." *Id.* at 86.

182. By contrast, if separate statements are used to support "police patrols"—more centralized, systematic monitoring of agencies by Congress—frequency is a virtue. *See* McCubbins & Schwartz, *supra* note 176, at 166. Some have questioned McCubbins and Schwartz's contention that Congress relies to a greater extent on fire alarms than police patrols. *See* ABERBACH, *supra* note 166, at 98-99 (concluding, based on a survey of congressional staffers, "the police-patrol approach is prominent").

183. 162 CONG. REC. S2533 (daily ed. Apr. 28, 2016) (statement of Sen. Warren).

Commissioner Robert McDowell in arguing that no new government regulations on net neutrality were needed to protect consumers.[184]

Members of Congress may take special note when concurring or dissenting commissioners speak directly to them. In September 2008, the CFTC issued a Staff Report with recommendations for the regulation of "swap dealers" (market-makers in over-the-counter swap transactions).[185] Commissioner Bart Chilton dissented from the report.[186] While expressing appreciation for the work of Commission staff, Commissioner Chilton stated that he "d[id] not believe the Commission's recommendations go far enough," critiqued some of the underlying data on which the recommendations were based, and urged the Commission to "request that Congress provide specific statutory authorities" to allow the Commission to address the problem.[187] In introducing legislation to amend the Act several weeks later, Senator Carl Levin (D-Mich.) noted that the bill was "consistent with CFTC Commissioner Chilton's dissenting views" and "provide[d] the CFTC with the statutory authorities requested by Commissioner Chilton."[188]

These direct, public requests embodied in published concurrences or dissents may carry more weight with reputation-conscious legislators than do private, informal conversations. Indeed, there is evidence to suggest that agenda setting in congressional oversight is driven in no small part by the desire of legislators to avoid scandal, crises, and the like.[189]

One final point is worthy of mention. Congress can also manipulate agency structure and design in order to safeguard original political understandings from future upset.[190] But Congress has not

184. 157 CONG. REC. 17,017 (2011) (statement of Sen. Ayotte).

185. CFTC, STAFF REPORT ON COMMODITY SWAP DEALERS & INDEX TRADERS WITH COMMISSION RECOMMENDATIONS (2008), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcstaffreportonswapdealers09.pdf [https://perma.cc/SRC5-JBKT].

186. *Id.* at 60-62.

187. *Id.* at 60-61.

188. 154 CONG. REC., 21,715 (daily ed. Sept. 25, 2008) (statement of Sen. Levin). Although the bill never made it out of committee, the Dodd-Frank Act later provided the CFTC and the SEC with authority to regulate over-the-counter swaps. 15 U.S.C. § 8302 (2012).

189. ABERBACH, *supra* note 166, at 120-21.

190. Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93-94, 99-100 (1992); McCubbins et al., *supra* note 161, at 256-59, 261-63; Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1440-46 (2011); *see also* McCubbins et al., *supra* note 163, at 432-33.

attempted to manipulate the availability or frequency of separate statements in this way. Agency-authorizing statutes make no mention of separate statements or the procedures governing them.[191] Rather, the practice of separate statements evolved organically within agencies, likely as an import from the judicial process. To date, therefore, the assistance these statements provide in facilitating oversight is, from the perspective of Congress, mere fortuity.

### *B. Presidential Oversight*

For all of the reasons detailed in the previous Section, separate statements can be a boon to congressional committees and individual members seeking to assess the extent to which independent commissions may be acting as unfaithful agents. But separate statements are not a tool of congressional oversight alone. They can also facilitate *presidential* oversight.[192] Separate statements can improve oversight by translating complex commission decisions into plain English, by highlighting potentially problematic decisions, or by revealing individual commissioner preferences

Of course, in contrast to executive agencies, so-called independent commissions are designed to be insulated *from* the President.[193] The President can only remove commissioners for cause,[194] and independent commissions need not submit either their rules or their budgets for OMB review.[195] These commissions also have independent litigating authority.[196] And yet, the President is not wholly without

191. Of particular relevance to this Article, neither the Federal Power Act, 16 U.S.C. §§ 791a-825r (2012), nor the Atomic Energy Act, 42 U.S.C. §§ 2011-2297g-4 (2012), contain directions for how to handle separate statements. The Energy Reorganization Act of 1974 is similarly devoid of language on separate statements. 42 U.S.C. §§ 5801-5891 (2012).

192. The literature on presidential control has also been attuned to the problem of bureaucratic slippage. LEWIS, *supra* note 104, at 4-11.

193. Indeed, David Lewis has found an association between the creation of more insulated agencies and periods of divided government characterized by strong congressional majorities. *Id.* at 60; *see also* Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 275 (John E. Chubb & Paul E. Peterson eds., 1989) (explaining that Congress, under pressure from interest groups, may choose to make an agency independent to shield it from the President's removal and management powers).

194. *See* Bressman & Thompson, *supra* note 105, at 600 (identifying removal restrictions as key in differentiating independent agencies from executive agencies).

195. *See* VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 3 (2012).

196. *Id.* However, as commentators have noted, the Solicitor General, who reports to the

influence. The President may deploy powers of *selection*, *management*, and *persuasion* to influence independent commissions. The operation of each can be informed by commissioner separate statements.

The relative independence of these commissions is premised, first and foremost, on the absence of presidential authority to remove commissioners without cause.[197] However, the President maintains the authority to appoint independent commissioners with the advice and consent of the Senate and to designate commission chairs.[198] This selection power makes it more likely that nominees will be sympathetic to the President's policy priorities and perhaps even more open to White House influence.[199] Further, by designating the commission chair, the President has the power to endow one particularly loyal individual with significant management and agenda-setting authority.[200]

For the President to use her selection powers effectively, however, she must be able to verify the faithfulness of her chosen agents. While she has no removal recourse in the case of unfaithfulness, information about fidelity will likely inform future selections. For example, if there is evidence that a commissioner has become firmly opposed to a particular presidential policy priority, the President may seek to appoint future commissioners who will more reliably

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President, controls independent agency litigation once it reaches the Supreme Court. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 287-88 (1994); Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 GEO. WASH. L. REV. 1080, 1088-89 (2009) (using the FTC as a case study to argue that the Solicitor General limits independent agencies' abilities to press arguments that conflict with the President's preferences in the Supreme Court).

197. Congressional authority to create such independent commissions was recognized in *Humphrey's Executor v. United States*, 295 U.S. 602, 628-29 (1935), which upheld limitations on presidential removal authority over FTC Commissioners, *id.* at 631-32. *See also* Morrison v. Olson, 487 U.S. 654, 686-93 (1988) (citing *Humphrey's Executor,* 295 U.S. at 602, with approval and extending its logic to the Office of the Independent Counsel).

198. *See Morrison*, 487 U.S. at 670 (noting that the President may appoint principal officers with the advice and consent of the Senate, and may appoint inferior officers alone).

199. As one commentator put it, independent commissioners cannot "hope to survive through the normal eight-year tenure of a President who does not like them." Kenneth C. Cole, *Presidential Influence on Independent Agencies*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 74 (1942).

200. None of these powers is unqualified. As discussed in Part I.B.2, in periods of divided government, the Senate may withhold its consent to the President's nominees unless the nominees are "batched" with minority commissioners who are party loyalists. *See supra* note 137.

vote according to the President's preferences on that particular issue. The logic here is not unlike that governing Supreme Court nominations. A President cannot withdraw a nomination after a Justice is confirmed, but if a Justice turns out to espouse particular views that are not in line with the President's, the President can prioritize those issues in selecting her next nominee.

Commissioner separate statements are perhaps the most reliable evidence of a commissioner's positions on the issues. Unlike judicial opinions, commission decisions adopted by the majority are not "authored" by a single commissioner.[201] It is therefore not possible to determine a single commissioner's preferences from the text of those decisions. While statements concurrent with voting—such as the oral statements made by FERC Commissioners at Commission meetings or the written statements that NRC Commissioners attach to staff issue papers—offer similar insights, they are less easily monitored by presidential staff than are separate statements published in the *Federal Register*.[202] Press releases and other public statements might provide similar information, but these are not routinely issued by commissioners across agencies.[203]

Presidents may also use *management* tools to influence independent commissions. These include manipulation of budgets and staffing levels.[204] Presidents also review and coordinate agency rulemaking through OIRA.[205] While OIRA's key requirements are binding only on executive agencies,[206] independent agencies are exhorted to comply.[207] There is some evidence that they do.[208] But

201. *See infra* notes 265-66 and accompanying text.

202. *See supra* Part I.B.1.

203. *See supra* Part I.B.1.

204. In his study of the FTC, Haoran Lu noted that President Nixon requested increased staffing levels during his efforts to revitalize the Commission while President Reagan limited the Commission's ability to operate effectively by reducing staffing levels. Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 PRESIDENTIAL STUD. Q. 51, 64 (1998).

205. *See supra* note 13.

206. Most executive orders exempt independent agencies, as defined in the Paperwork Reduction Act. *See, e.g.*, Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638, 641 (1994) (excluding "independent regulatory agencies" as defined by statute).

207. *See, e.g.*, Exec. Order No. 13,579 §§ 1-2, 3 C.F.R. 256, 257 (2012) (urging independent agencies to comply with Executive Order 13,563's requirements, including the obligation to conduct retrospective analysis of existing rules).

208. *See* Anderson P. Heston, *The Flip Side of Removal: Bringing Appointment Into the Removal Conversation*, 68 N.Y.U. ANN. SURV. AM. L. 85, 99-100 (2012) (offering evidence that

determining whether or not compliance has actually occurred can be challenging. In their separate statements, especially those that take issue with commission decisions on procedural grounds, commissioners can flag inconsistencies with practices advocated by OIRA and OMB. For example, such statements might reveal that a cost-benefit analysis was not performed, or that the analysis neglected a key variable.

More recently, Eloise Pasachoff has suggested that presidents can exercise significant control over both executive and independent agencies through OMB's Resource Management Offices (RMOs).[209] Pasachoff identifies seven levers presidents may use to impact agency priorities and actions.[210] These include OMB's ultimate approval authority over agency budget requests,[211] its oversight of agency spending,[212] and the implementation of management initiatives with substantive policy goals in mind.[213] Again, for each of these mechanisms, an understanding of the agency's current preferences and priorities will enhance the deployment of control levers. Those preferences and priorities can be made clearer through review of separate commissioner statements. For example, if the President learns via a dissent that a commission may be insufficiently responsive to the concerns of a particular segment of industry, he can prioritize programs benefitting that industry segment through budget management.

Finally, a President may influence independent agencies through persuasion or, as Paul Verkuil put it, "jawboning."[214] Yet here too,

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the FTC complied with OIRA Administrator John Graham's request to modify regulations regarding lender disclosures); *see also* OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 130 tbl.C-1, 131 tbl.C-2 (2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf [https://perma.cc/4X94-JA9X] (showing that many independent agencies engage in some form of cost-benefit calculation).

209. *See* Pasachoff, *supra* note 13, at 2191-92.

210. *See id.* at 2207-08.

211. *See id.* at 2213-14.

212. *See id.* at 2228-37.

213. *See id.* at 2237-43.

214. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943-44 (1980). Presidents might also use less formal suasion to impact intra-agency appointments. Bressman & Thompson, *supra* note 105, at 644 (recalling former SEC Chairman William Cary's description of pressure from the Kennedy White House on agency appointments).

presidents must have information about agency preferences in order to effectively influence agencies. Knowing where to exert pressure requires knowing where commissioners stand. And again, separate statements provide the clearest indication of each commissioner's policy preferences and priorities.

## III. DISSENT'S ROLE IN CHECKING ARBITRARINESS

Perhaps even more powerful than dissent's role in facilitating agency oversight is its potential to control arbitrariness in agency decision-making. Many features of independent agencies are intended to promote neutral, expert decision-making. These include term appointments and removal protections, as well as exemption from the requirement that major regulations be submitted to review by the Executive Office of the President.[215]

This Part will first explore the ways in which commissioner separate statements contribute to the effective functioning of independent commissions as expert bodies. Scholars cite independent commissions' multimember structure as a safeguard of expert decision-making.[216] Part III.A argues that the threat and fact of published separate statements contribute to the effectiveness of this design tool in enhancing decisional quality.

Part III.A examines ways in which the courts can magnify the salutary impact of commission dissent. It first describes a series of cases in the D.C. Circuit embodying what might be called "deliberation-forcing" in that the holdings require commission opinions to respond to arguments raised in dissents. It then argues that the doctrine could be used more extensively as a bulwark against arbitrary decision-making. Specifically, courts might deploy other standards of review—in particular *Chevron* and *Auer* deference[217]—in a similar deliberation-forcing fashion. Finally, it acknowledges the potential for abuse of deliberation-forcing for deregulatory or political ends, and suggests ways to mitigate these potential costs.

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215. *See supra* notes 193-95 and accompanying text.

216. *See* Barkow, *supra* note 21, at 37-39.

217. *See* Auer v. Robbins, 519 U.S. 452 (1997); Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837 (1984).

### *A. Separate Statements and Decision-Making Quality*

One key structural feature of independent commissions is their multimember composition.[218] The D.C. Circuit even suggested that the check provided by multimember composition may be strong enough to substitute for more direct political oversight.[219] Recently, in the *PHH Corp.* case, Judge Brett Kavanaugh suggested that intracommission checking embodied the theory animating the Constitution's separation of powers: let ambition counteract ambition.[220] "The multi-member structure [of independent commissions]," Judge Kavanaugh concluded, thus "reduces the risk of arbitrary decision-making and abuse of power, and thereby helps protect individual liberty."[221]

A variety of possible mechanisms exist by which multiple membership might lessen the tendency toward arbitrary decision-making. Interest groups may find it harder to capture a majority of commissioners than a single agency head.[222] Crucially, multiple membership might also improve decisional *quality*, by "foster[ing] more deliberative decision making,"[223] and/or by ensuring that more

218. Indeed, the original purpose of such commissions was to promote considered, expert decision-making. Datla & Revesz, *supra* note 21, at 777 ("Th[e] goal of impartial expertise motivated many of the structural features of the early independent agencies."); *see also* Barkow, *supra* note 21, at 19-26 (arguing that insulation in general, not just from presidential oversight, is the major driver of the independent commission form).

219. PHH Corp. v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016) (referring to this structure as a "critical substitute check"), *vacated and reh'g en banc granted* Feb. 16, 2017.

220. *See id.* at 25-26. Although he technically invoked separation of powers in favor of a more unitary conception of the executive, one cannot help but feel that Kavanaugh is, to some extent, a functionalist. Judge Kavanaugh's functionalism—if it can be so labeled—appeared to stem, not from his underlying theory of constitutional interpretation, but from a respect for settled historical practice. *See id.* at 23 ("[H]istorical practice matters a great deal in defining the constitutional limits on the Executive and Legislative Branches.").

221. *Id.* at 6.

222. *See* Datla & Revesz, *supra* note 21, at 794 (citing BERNSTEIN, *supra* note 11, at 70); *see also PHH Corp.*, 839 F.3d at 28 (citing Bressman & Thompson, *supra* note 105, at 611).

223. *PHH Corp.*, 839 F.3d at 26 (citing Datla & Revesz, *supra* note 21, at 794); *see also* Recent Legislation, *Dodd-Frank Act*, 124 HARV. L. REV. 2123, 2128 (2011) ("[T]he presence of dissenters [in agency proceedings] provides new information and forces the proponent to articulate a coherent rationale, thus acting as a constraining force."). In another context, dissent during policy formulation has been found to provide additional information, challenge invalid assumptions, and reduce the propensity for "groupthink." Robert S. Dooley & Gerald E. Fryxell, *Attaining Decision Quality and Commitment from Dissent: The Moderating Effects of Loyalty and Competence in Strategic Decision-Making Teams*, 42 ACAD. MGMT. J. 389, 398-99 (1999) (studying strategic decision-making by U.S. hospital teams).

diverse perspectives are brought to bear on the issue before a commission.[224] In other words, multimember decision-making "leads to better-informed and reasoned policy outcomes from the agency."[225] To the extent that group decision-making tends to hew toward the middle ground, commission decision-making might also be "superior" in the sense that it limits the adoption of extreme positions.[226]

Dissent, or at least the threat of dissent, is crucial to the effective operation of some of these mechanisms. Specifically, it enhances the positive effect of disagreement on decisional quality. Individual commissioners have two sources of leverage when it comes to commission decision-making. First, they can threaten to withhold their votes, which makes it more difficult for the chair to secure a majority. The effectiveness of this tool depends on the breadth of existing support for a decision. It will have a less pronounced effect when the chair has sufficient votes to approve the decision with or without the reluctant commissioner. Second, commissioners can threaten to make their disagreement public. This approach may be effective even when the chair still has a majority.

While public disagreement may be aired in may ways, published separate statements may be particularly embarrassing for the other commissioners.[227] For one thing, published separate statements are *durable*. They remain part of the rulemaking for all of posterity, rather than fading from the public consciousness as a press statement might. In addition, published separate statements are part of the record for review and are likely to be considered by a reviewing court should the decision be litigated.[228] The threat of dissent thus amplifies the relative bargaining strength of individual

224. *See PHH Corp.*, 839 F.3d at 26 (citing Breger & Edles, *supra* note 49, at 1113) (noting that membership diversity can lead to more thorough ex ante discussion of costs and benefits); *see also* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 696 (2013) ("[A] multimember board allows for a representation of divergent interests in a way that a single decisionmaker simply cannot.").

225. Datla & Revesz, *supra* note 21, at 794.

226. *See PHH Corp.*, 839 F.3d at 27.

227. In fact, some commissioners do express verbal, public disagreement with their fellow commissioners, sometimes in spectacular fashion. *See supra* notes 170-72 and accompanying text. These extra-procedural statements are perhaps more damaging to the commission's reputation than are published separate statements in that they indicate a lack of faith in the traditional channels of dissent to effectuate change.

228. *See infra* notes 237-41 and accompanying text.

commissioners. At the margins, these commissioners may be able to force more careful consideration, or even compromise, than they could by leveraging the threat of a "no" vote by itself.[229]

Threats of dissent backed up by actual draft statements can be even more useful as means of improving a decision's substance. For one thing, unlike the mere threat of dissent, a draft signals the author's commitment to public disagreement.[230] For another, when faced with written objections, the majority might feel a greater compulsion to respond.[231] If the dissent's arguments are well-presented, they might inspire better, more analytically sound writing by the majority.[232] Judge Marsha Berzon celebrates judicial separate opinions as an example of what Daniel Kahneman calls "adversarial collaboration"—the forced grappling with alternative views that serves to counter cognitive biases.[233]

Even when the majority opinion does not respond to or even consider the views expressed in separate opinions, those opinions can still improve the quality of a body's overall output, either by qualifying the majority's approach or by enhancing it. As an example of the former, Justice Brennan suggests that dissents can do "damage control" by limiting an overbroad majority opinion.[234] Charles Fried put this point another way when he wrote that dissents can "complete[ ]" a majority opinion "by showing what th[e]

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229. *Cf.* Wood, *supra* note 10, at 1465 (noting that, in the judicial context, the mere threat of a published dissent can often result in a better-considered majority opinion).

230. *See* Brennan, *supra* note 31, at 430-32 (discussing the enduring merits of certain famous dissents).

231. *See id.* at 430 (arguing that dissents force the majority to deal with hard questions). Responding to critiques that appear in separate opinions would be standard practice if the jurisprudence requiring commission majorities to respond to the points raised by their dissenting colleagues became more widely accepted. *See infra* Part III.B.

232. Writing in tribute to her recently deceased colleague Justice Antonin Scalia, Justice Ruth Bader Ginsburg noted that his opinions challenged her "to meet his best efforts with my own." Susan Svrluga, *George Mason Law School to Be Renamed the Antonin Scalia School of Law*, WASH. POST: GRADE POINT (Apr. 1, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/31/george-mason-law-school-to-be-renamed-the-antonin-scalia-school-of-law/ [https://perma.cc/D6GA-C8Q2].

233. Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CALIF. L. REV. 1479, 1483-84 (2012) (quoting Daniel Kahneman, *Experiences of Collaborative Research*, 58 AM. PSYCHOL. 723, 729-30 (2003)).

234. Brennan, *supra* note 31, at 430; *see also* Wood, *supra* note 10, at 1452-56 (suggesting that dissent can establish the majority opinion's limits).

opinion is not."[235] Dissents and concurrences might also serve as a guide to majority opinions by drawing attention to critical facts.[236] In all of these cases, the separate statements enhance the visibility of the commission's reasoning, reducing the arbitrariness of the overall output.

The next Section turns to ways in which the courts might enhance these salutary effects.

### *B. Separate Statements and Deliberation-Forcing*

Other governmental actors can enhance the effectiveness of internal agency checks. Given that both the threat and practice of drafting separate statements can have a salutary effect on decisional quality, what role, if any, can the judiciary play in promoting its benefits?

Courts do pay attention to separate statements, citing to them in a number of contexts. Many acknowledgements are in passing: commissioner dissents and concurrences are frequently reported in the procedural sections of judicial opinions, for example.[237] Judges sometimes cite separate statements to support their own majority[238] or dissenting[239] views. In other cases, a judge may disagree

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235. Charles Fried, *The Supreme Court, 2001 Term—Comment: Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 179 (2002).

236. *See* Wood, *supra* note 10, at 1453-54.

237. *See, e.g.*, Am. Trucking Ass'ns v. United States, 364 U.S. 1, 5 n.2 (1960) (reporting the comments of one concurring Commissioner on the underlying order and noting that three other Commissioners dissented); Nat'l Ass'n of Broads. v. FCC, 789 F.3d 165, 170 (D.C. Cir. 2015) (noting that two Commissioners dissented in part from the Commission's order); Cellco P'ship v. FCC, 700 F.3d 534, 540 (D.C. Cir. 2012) (reviewing the argument of the two dissenting Commissioners); Chamber of Commerce v. SEC, 412 F.3d 133, 137 (D.C. Cir. 2005) (outlining the dissenting Commissioners' major arguments in opposition to the underlying rule); Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667, 722-23 (D.C. Cir. 2000) (per curiam) (explaining the two dissenting Commissioners' arguments, which one of the parties to the instant rulemaking relied upon), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002).

238. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 18 n.15 (1986) (citing the dissenting Commissioners' reasoning with approval); Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 708 (D.C. Cir. 2014) (relying on an explanation in Commissioner Pai's dissent); Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 841 (D.C. Cir. 2006) (reviewing arguments of two dissenting Commissioners and noting that they were "plainly correct").

239. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 556 (2009) (Breyer, J., dissenting) (citing a dissenting Commissioner's reference to the case underlying the policy that the FCC abandoned in the underlying rulemaking); Mistretta v. United States, 488 U.S.

with a commissioner's dissent but feel compelled to respond.[240] In still others, a judge may believe the concurring or dissenting commissioner has the better argument but still uphold the commission decision.[241]

Courts also use commissioner separate statements in a way that impacts the agency more squarely: to invalidate the commission majority's position under "arbitrary and capricious" review. This move is "deliberation-forcing" in that it incentivizes commissioners to work out their differences in advance (or at least to respond to each other's arguments). It is thus consistent with existing doctrines that incentivize procedural adjustments at agencies as opposed to (or in addition to) focusing on substantive outcomes. Consider, for example, the APA's requirement, as interpreted by the courts, that an agency respond to public comments on a proposed rule so long as they are of "cogent materiality."[242] This response requirement necessarily implies that such comments be considered as part of the agency's decision-making process.[243] Similarly, requiring that an agency

361, 414-15 (1989) (Scalia, J., dissenting) (citing the dissenting Commissioner's view to support argument that Commission decisions were value-laden); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 164-65 (1973) (Douglas, J., concurring in the judgment) (agreeing with dissenting Commissioner that FCC programming review had a chilling effect on broadcast expression); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1155 (D.C. Cir. 1988) (Mikva, J., dissenting) (chastising the majority for its reliance on a Commissioner dissent); Wisc. Elec. Power Co. v. OSHRC, 567 F.2d 735, 738-40 (7th Cir. 1977) (Pell, J., dissenting) (adopting unpublished Commissioner's dissent as his own and reproducing it in full).

240. *See, e.g.*, Green v. FCC, 447 F.2d 323, 332 (D.C. Cir. 1971) ("Commissioner Johnson's lengthy dissenting discussion, compels us to interject a word of explanation regarding the matter of analogy to [a line of cases that the court ultimately found distinguishable].").

241. *See, e.g.*, Democratic Nat'l Comm. v. FCC, 717 F.2d 1471, 1479 (D.C. Cir. 1983) (upholding Commission decision but agreeing with dissenting Commissioners that dicta should have been disapproved); Ohio Power Co. v. FERC, 668 F.2d 880, 887-88 (6th Cir. 1982) (citing concurring Commissioner opinion at length to support its admonition that "[a]lthough we affirm the conclusion reached by the Commission, we do not intend to express complete satisfaction with its opinion"); Am. Pub. Gas Ass'n v. FPC, 567 F.2d 1016, 1043 (D.C. Cir. 1977) (finding presumption of reasonableness not overcome and upholding the Commission's decision even though support offered for its approach was "thin" and its response to the dissenting Commissioner was "weak"); Citizens for Allegan Cty., Inc. v. FPC, 414 F.2d 1125, 1132 & n.11 (D.C. Cir. 1969) (hinting that court would have adopted position of dissenting Commissioner under a different standard of review).

242. United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (holding that a failure to address such comments in the final rule constituted a breach of APA § 553(c)).

243. A more extreme version of the doctrine is that adopted by Judge Bazelon in the *Ethyl Corp.* case, in which he identified the proper role of the judge in "hard look" review under *State Farm* to involve scrutiny of an agency's decision-making *process* alone. *See* Ethyl Corp.

justify a rulemaking based on the record before if at the time— rather than post hoc, during litigation—supports deliberation values.[244]

This list is not exhaustive, but it demonstrates that deliberation-forcing is not a new concept, and that it would therefore be unsurprising if some form of the doctrine underlay the D.C. Circuit's holdings on consideration of commissioner dissent. And as Part III.B.2 suggests, there are opportunities for the courts to expand this move to the review of commission interpretations of text under the *Chevron* doctrine.

*1. Arbitrary and Capricious Review*

In applying the "arbitrary and capricious" standard of review, courts have on occasion shown special solicitude for the views of dissenting commissioners. The D.C. Circuit Court of Appeals in particular has found commission actions arbitrary and capricious when a commission majority failed to consider an alternative proposed by a dissenting commissioner. Consider *Chamber of Commerce v. SEC*, in which the D.C. Circuit reviewed an SEC rule requiring that certain mutual funds have an independent board chairman.[245] Two dissenting Commissioners had proposed that, in lieu of requiring an independent chairman, the rule should require funds to disclose any chair conflicts of interest.[246] The D.C. Circuit held that the SEC's failure to consider disclosure as an alternative to an independent chair was arbitrary and capricious.[247]

The requirement that an agency consider reasonable alternatives to its proposal dates back to *State Farm*.[248] That requirement did not obviously apply to alternatives raised in a commissioner's

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v. EPA, 541 F.2d 1, 66-68 (D.C. Cir. 1976) (Bazelon, J., concurring). Bazelon argued that judges were ill equipped to review the complex subject matter of agency decisions, and that hewing to procedural oversight would prevent judicial activism. *See id.* at 66-67.

244. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 573, 580 (2d ed. 2013) (describing the possible benefits of requiring an agency to set forth its reasoning at length in final rules).

245. 412 F.3d 133, 136 (D.C. Cir. 2005).

246. *See id.* at 144.

247. *See id.* at 144-45.

248. *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48, 50-51 (1983) (invalidating a National Highway Traffic Safety Administration (NHTSA) rule for failure to consider alternative way of achieving statutory objectives).

concurrence or dissent. However, nothing about such an application seems obviously inconsistent with *State Farm*'s approach.

A few years later, however, the D.C. Circuit extended its consideration requirement to *arguments* raised by dissenting commissioners.[249] In *American Gas Ass'n v. FERC*, the court invalidated certain FERC revisions to financial forms and reporting rules for interstate natural gas pipelines because the Commission had failed to "acknowledge and consider" the arguments raised in then-Commissioner Wellinghoff's dissenting opinion.[250] The Commission, the court continued, had also failed to provide a "direct response" to Commissioner Wellinghoff's arguments.[251] The court recently reiterated the "direct response" requirement in *Electric Power Supply Ass'n v. FERC*, in which the majority found a rate set by the Commission arbitrary and capricious due to its failure to "properly consider" and "engage" the arguments raised in a dissent by Commissioner Moeller.[252]

Nothing in *American Gas Ass'n* or *Electric Power Supply Ass'n* requires a commission to actually adopt a dissenting commissioner's approach—a commission need only consider and respond to it.[253] In this sense, the holdings are similar to judicial interpretations of section 553(c) of the APA requiring responses to significant public comments.[254] But the fact that these arguments come from other commissioners, rather than the public or somewhere else, suggests an additional justification for the doctrine. By requiring that reasonable arguments raised in separate opinions be considered and addressed in the majority opinion, courts encourage greater dialogue between commission members.[255] For that reason, this weak form of special solicitude for the alternatives and arguments raised by

249. *See* Am. Gas Ass'n v. FERC, 593 F.3d 14, 19-20 (D.C. Cir. 2010) (citing Laclede Gas Co. v. FERC, 873 F.2d 1494, 1498 (D.C. Cir. 1989)) (finding that FERC was required to consider reasonable alternatives raised by parties to a proceeding).

250. *Id.* at 15-16, 20.

251. *Id.* at 20.

252. 753 F.3d 216, 224-25 (D.C. Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 760 (2016).

253. Note that the consideration and response requirements likely apply only to final rules, as preliminary rulemaking documents are largely insulated from judicial review under the APA. *See* 5 U.S.C. § 704 (2012) (providing for review of "final agency action" only unless other actions are made reviewable by statute).

254. *See* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

255. *See supra* Part III.A.

dissenting commissioners might be called "deliberation-forcing."[256] The chairman and her staff are more likely to respond to the views of individual commissioners if they know that, should they fail to do so, and should those commissioners later decide to memorialize their views in a separate statement, the commission decision risks being overturned by the courts.[257] Because it forces more careful consideration of certain issues by commissioners, deliberation-forcing might produce better-quality decisions.[258]

Notwithstanding the basic soundness of deliberation-forcing, a few concerns are worth noting. The first relates to the contours of the doctrine. *Chamber of Commerce* limited the required consideration of alternatives proposed by the dissent to those not "frivolous," "out of bounds," or otherwise "unworthy of consideration,"[259] and *American Gas Ass'n* adopted these limits.[260] Nowhere, however, did either court define these terms or provide examples of what proposals or arguments might be "unworthy." Commissions attempting to determine which dissenting statements require a response are therefore left with little guidance and may interpret the obligation either too broadly or too narrowly. If they interpret it too narrowly and respond to too few dissenting statements, they may suffer costly judicial reversals. This risk may lead them to interpret the obligation more broadly than necessary. However, if they do, they may

256. This phrase is a play on "expertise-forcing," coined by Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

257. In fact, commission staff members indicated that the agencies were indeed modifying their practices in response to these decisions, providing greater opportunity for circulation of and response to commissioner separate statements in the majority decision.

258. Alternatively, as the D.C. Circuit recognized earlier in its history, the presence of published dissents might itself be an indication of careful commission consideration. In upholding an FPC order authorizing a natural gas pipeline, the D.C. Circuit emphasized the "vigorous dissent" by two Commissioners in finding that the Commission had given the case "close scrutiny." Fla. Econ. Advisory Council v. FPC, 251 F.2d 643, 648 (D.C. Cir. 1957). The content of a dissent might serve the same function. *See, e.g.*, Common Carrier Conference v. United States, 534 F.2d 981, 983 (D.C. Cir. 1976) (per curiam) ("That the attention of the [Interstate Commerce] Commission was focused on the matter is clear enough from the analysis in Commissioner Clapp's dissent.").

259. 412 F.3d 113, 144-45 (D.C. Cir. 2005).

260. 593 F.3d 14, 19-20 (D.C. Cir. 2010) (quoting *Chamber of Commerce*, 412 F.3d at 145). These limiting principles were nominally rooted in the D.C. Circuit's jurisprudence on FERC-approved settlements. In *Laclede Gas Co. v. FERC*, the court held that "where a party raises facially reasonable alternatives to FERC's decision to reject a contested settlement, the agency must *either* consider those alternatives *or* give some reason ... for declining to do so." 873 F.2d 1494, 1498 (D.C. Cir. 1989).

spend valuable time and resources responding to "frivolous" alternatives and arguments raised by their dissenting colleagues.

The risk of overresponse might seem either small or at least insufficiently serious to outweigh the deliberation-forcing benefits of the doctrine. Consider, however, that not all commissions are as conservative in their dissenting practices as are FERC and the SEC. The doctrine might produce different results on the FCC, which has a much higher dissent rate and where dissenting commissioners tend to be much less restrained in their opposition.[261] Were FCC Commissioners in the majority in any given case to feel a greater obligation to respond to all of the comments raised in separate statements, the pace of both rulemaking and adjudications could be significantly slowed.[262]

Second, deliberation-forcing might not operate as smoothly on administrative commissions as it might on multimember courts, for reasons that may not be immediately apparent to the authors of the doctrine. Judges may picture commission processes as similar to their own, imagining that draft opinions are regularly circulated and that opportunities to meet informally to discuss drafts are unrestricted. On at least some independent commissions, however, the picture is more complicated. As discussed in Part I.B.1, drafts of separate opinions at FERC are not typically circulated for comment. In part, this is due to timing; Commissioners typically do not draft their own separate statements until after the official commission vote on the matter.[263] These statements are then completed between the commission vote and the issuance of the opinion.[264] This gives the other Commissioners very little time to respond to new

261. *See supra* Parts I.A.1.c, I.B.

262. One might think that because dissenting commissioner views are also likely to be reflected in public comments to the agency (or are likely to reflect them), and because the agency is already obligated to respond to "significant" public comments, *see* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015), "deliberation forcing" is uneccesary. However, even if the sets of arguments raised in public comments and those raised in commissioner separate statements currently overlap (a point that would require empirical confirmation), this need not always be the case. Individual commissioners could produce separate statements that raise entirely new arguments, which must then be considered by the agency in order to survive rationality review.

263. *See supra* notes 110-12 and accompanying text.

264. *See supra* notes 110-12 and accompanying text. In some cases, statements may even be written and issued after the Commission decision itself has been issued. *See supra* Part I.B.1.

arguments or alternatives raised in the separate statements, and issuance of the (often time-sensitive) opinions may be delayed as a result.

In addition, "[u]nlike the judges of the federal judiciary, members of administrative commissions do not do their own work."[265] Drafting of opinions is delegated to commission staff. Unlike a judge working in close collaboration with a small number of law clerks, majority commission decisions are delegated in most cases to opinion-writing sections or other specialized staff. Thus, James Landis's observations of half a century ago translate nicely to this context: deliberation-forcing solutions require "broad changes in the presuppositions that the [courts] h[ave] been led to believe underlies the work of our regulatory agencies."[266] If greater deliberation between commissioners is the goal, requiring the majority statement to respond to arguments raised in dissent may not be sufficient to achieve it.[267]

Compounding each of these problems is the possibility that, were the deliberation-forcing doctrine to be embraced more broadly, it might result in an increase in the number of separate commission opinions. Although deliberation-forcing may increase the willingness of commissioners in the majority to reach compromises with colleagues who disagree, for commissioners who still do not feel that their views are adequately reflected in the majority approach, the calculus changes. The deliberation-forcing doctrine makes writing separately much more attractive, since doing so is more likely to trigger a reversal of the commission decision.[268] Thus, the doctrine may produce separate opinions in situations where we might otherwise think that the costs of dissent outweigh its potential benefits.[269]

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265. LANDIS REPORT, *supra* note 98, at 19. Based on conversations with current and former Commissioners and staff, this observation remains accurate today with respect to the drafting of rules and other decisions.

266. *Id.* at 20.

267. If, however, the goal is to encourage more dialogue and debate among commission staff more generally, or between the staff of individual commissioners and those who draft majority opinions and rules, then the D.C. Circuit's approach will be more effective. The concern about the timing of separate statement issuance, however, still remains.

268. *See supra* notes 253-60 and accompanying text.

269. *See infra* Part IV. If taken too far, this additional incentive to write separately could produce considerable legal uncertainty. This is because, at least on occasion, commission votes could become so fractured that there is no clear majority position. *See, e.g.*, Breger & Edles, *supra* note 49, at 1182 n.355 (citing an NLRB case from 1995 in which the Commission split

*2. Interpretive Deference*

The basic steps of *Chevron* deference, under which judges review many agency interpretations of statutory text, are by now familiar.[270] As a preliminary matter, a court decides whether the agency interpretation has the "force of law," an inquiry that precludes deference for more informal agency statements.[271] Then the court determines whether Congress has spoken to the precise question at issue or whether the statutory text is ambiguous.[272] If there is ambiguity, the court will defer to a reasonable agency interpretation.[273]

Judges might use *Chevron* review, like *State Farm* review, as a deliberation-forcing device. Under *Chevron*'s second step, judges must ask whether an agency's interpretation of an ambiguous statutory provision is reasonable.[274] Dissents can complicate this analysis in the same way that they can complicate arbitrary and capricious review.[275] Namely, if even one commissioner disagrees with the majority's interpretation of statutory text, it can be a reasonableness "red flag." It might even be argued that, if the heads of a commission cannot agree about statutory meaning, courts should not cite the agency's relative expertise advantage as a justification for deference.[276]

That courts *do* defer to agency interpretations when the agency is itself divided on the correct meaning of the statutory provision might mean one of three things. First, the court might not be relying on the expertise justification for *Chevron* deference. Second, the

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2-1-1 and the D.C. Circuit reversed, without examining the plurality opinion, after finding the concurring Commissioner's reasoning contrary to the governing statute).

270. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

271. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

272. *See Chevron*, 467 U.S. at 842-43.

273. *See id.* at 844.

274. *See id.*

275. The Supreme Court recognized the substantial overlap between the two analyses, noting that under *Chevron* step two, a court does not substitute its own interpretation unless the agency's is "arbitrary or capricious in substance, or manifestly contrary to the statute." Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 53 (2011) (quoting Household Credit Servs. v. Pfennig, 541 U.S. 232, 242 (2004)).

276. *See* Sunstein, *supra* note 12, at 196-97 (citing *Chevron*, 467 U.S. at 865, itself for the proposition that Congress may have desired courts to defer to agency interpretations due to agencies' greater subject matter expertise).

court might have concluded that agencies are *especially* better suited to interpret statutory text vis-à-vis courts when commission members cannot agree on the correct interpretation. Third, the court might have concluded agency expertise is not negatively impacted by disagreement among independent commissioners. Regardless of which of these theories is correct, however, the courts have failed to square their approach to *Chevron* with the D.C. Circuit's deliberation-forcing doctrine under *State Farm*.

The expertise rationale is sometimes tied to an agency's closer ties to legislators, better understanding of industry-specific terminology, and day-to-day experience of industry operations.[277] But the expertise rationale might break down if commissioners, each of whom presumably benefits from these advantages, are still at odds over the correct interpretation of a given statutory provision. Perhaps, in such cases, courts should understand agencies' relative interpretive advantages as more muted.

Alternatively, courts might understand "agency expertise" as referring not merely to the experience and qualifications of individual commissioners, but to the resources of the commission as a whole.[278] According to this view, disagreement and deliberation are part of a necessary process that allows the commission to realize the full benefits of its expertise and to produce an ultimate conclusion worthy of deference. Published separate opinions, by this account, are mere artifacts of the very process that is in part responsible for agencies' comparative advantage over courts when it comes to statutory understanding.

A final possibility is that courts believe that if two expert decision makers disagree about the proper interpretation of a statute they have been authorized to administer, generalist judges would be even *less* competent to interpret that particular provision.[279] In other words, interpretive disagreement on a commission flags particularly thorny interpretive problems. These thorny interpretive problems, we might think, are even more appropriately resolved by the subject-matter experts.

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277. *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1286-87 (2008).

278. *Cf.* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 575 (1985) (citing agencies' superior interpretive resources as justification for deference).

279. *Cf.* Sunstein, *supra* note 12, at 197.

No matter which of these views most accurately describes judicial motivations, courts should consider harmonizing their approach to *Chevron* deference in the presence of one or more commission dissents with the D.C. Circuit's deliberation-forcing approach to *State Farm* review. There is no obvious reason why an agency's action should be considered arbitrary for failure to consider a commissioner's reasoning. A deliberation-forcing approach to *Chevron* would require that, in order to receive deference for its interpretation of statutory text, an agency must show that it has considered a dissenting commissioner's interpretation and any reasons put forth to support that interpretation.

One missed opportunity for judicial deliberation-forcing under *Chevron* occurred in the Fourth Circuit's decision in *Piedmont Environmental Council v. FERC*.[280] The case concerned FERC's interpretation of a section of the Federal Power Act permitting the Commission to preempt state authority to site certain electric transmission lines if a state had "withheld approval for more than 1 year" after a permit application had been filed.[281] In the underlying administrative proceeding, Commissioner Kelly chastised the majority for failing to give the plain language of the Act adequate consideration.[282]

The Fourth Circuit found, at *Chevron* step one, that the statutory text clearly precluded FERC's interpretation.[283] Yet although the court noted Commissioner Kelly's dissent in describing the case's procedural history,[284] it failed to mention the Commissioner's dissent in the analysis section. A deliberation-forcing approach might instead have bypassed *Chevron* step one, concluding only that *even if* the statute were ambiguous, the Commission majority's failure to devote adequate consideration to Commissioner Kelly's argument rendered its interpretation unreasonable.

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280. 558 F.3d 304 (4th Cir. 2009).

281. *Id.* at 310-12 (quoting 16 U.S.C. § 824p(b)(1)(c)(i)). For more details on the Federal Power Act provision and its implications, see generally R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPACT*, 108 COLUM. L. REV. 404 (2008).

282. *See Piedmont Envtl. Council*, 558 F.3d at 311.

283. *See id.* at 315 ("Because Congress's intent is clear, our review under *Chevron* proceeds no further.").

284. *See id.* at 311.

Alternatively, in order to reach step two of *Chevron*, the court might have found that statutory language is presumptively ambiguous if expert administrators cannot agree about its meaning.[285] Adrian Vermeule and Eric Posner have addressed a related question in their writings on *The Votes of Other Judges*.[286] They propose a hypothetical Supreme Court conference in which five Justices opine that statutory language unambiguously means *X*, whereas the other four Justices assert that the same language unambiguously means *Y*.[287] They further suppose that each Justice has a relatively high level of confidence in his or her own interpretation.[288] In that scenario, Vermeule and Posner conclude, notwithstanding each Justice's confidence, each should reconsider in light of their colleagues' conclusions, and the Court should ultimately find the statute ambiguous.[289]

Similar reasoning might be applied to judicial review of an agency interpretation from which one or more commissioners dissented. While the determination of ambiguity under *Chevron* step one is ultimately a task for the judge rather than the agency,[290] the fact that the agency experts disagreed about meaning should provide valuable information to the court about textual certainty.[291]

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285. Of course, if an agency can come up with an unreasonable interpretation of a statute it is authorized to administer, a single commissioner can certainly do the same. A dissenting commissioner might fundamentally misconstrue statutory language, for example, or use his or her dissent to manipulate review by the courts. Even if these cases are rare, in neither scenario would a finding of textual ambiguity necessarily be appropriate.

286. *See* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges* 1-2 (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 16-04, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723957 [https://perma.cc/YTU8-TL57].

287. *Id.* at 3-4.

288. *Id.* at 15-17.

289. *Id.* at 17.

290. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (identifying courts as "the final authority on issues of statutory construction" and instructing judges to employ "traditional tools of statutory construction" in assessing ambiguity).

291. Indeed, one state court has taken the position that, in the tax context at least, "[t]he test of statutory ambiguity is whether the statute is capable of being construed in two different ways by reasonably well-informed persons." Kollasch v. Adamany, 313 N.W.2d 47, 51-52 (Wis. 1981).

Stephenson and Vermeule argue that the ambiguity inquiry collapses into the reasonableness inquiry. Stephenson & Vermeule, *supra* note 12, at 599 (proposing that the ambiguity inquiry is "nothing more than a special case of Step Two"). The authors contend that the task of the judge under *Chevron* is simply to define the "zone of ambiguity" of a particular passage. *Id.* at 601. Under this approach, the fact that a commission of experts failed to agree

This case for ambiguity might be especially strong where, as in *Piedmont*, *both* the commission *and* the judicial panel are divided on statutory meaning.[292] One might criticize the *Chevron* doctrine for removing interpretive authority from interpretive experts (the courts) and bestowing it on subject-matter experts (the agency decision makers).[293] Without opining on the wisdom of this arrangement, it seems reasonable that when *both* the subject-matter experts *and* the interpretive experts disagree internally about the meaning of a statutory phrase, that phrase should be deemed ambiguous.[294]

Thus, *Chevron* might be transformed into a deliberation-forcing doctrine at either step one or step two. If commissions know that their interpretations are likely to receive less deference in the presence of an interpretive dissent, they will have a greater incentive to reach agreement on statutory meaning. When this is not possible, the majority will at least have an incentive to offer a thoughtful response to the arguments made by their dissenting colleagues.

## IV. EVALUATING DISSENT

Dissent is neither a uniform good nor an unqualified evil: its benefits and costs depend largely on context. In science, for example, dissent is essential to test theories and expose their flaws.[295] In the military, by contrast, the need for coordination in dangerous, rapidly

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on the best interpretation of the statute might give the courts some idea as to the dimensions of that zone.

292. *See* Piedmont Envtl. Council v. FERC, 558 F.3d 304, 311, 319-20 (4th Cir. 2009); *id.* at 320 (Traxler, J., concurring in part and dissenting in part).

293. For example, the APA seems to envision that courts will be the primary interpreters of statutory text. *See* 5 U.S.C. § 706 (2012) (proclaiming that "the reviewing court shall ... interpret ... statutory provisions").

294. One wrinkle emphasized by William Baude in his critique of Posner and Vermeule's approach is that judges do not apply a uniform interpretive theory to statutory text. *See* Will Baude, *Does Judicial Disagreement Imply Ambiguity?*, WASH. POST: VOLOKH CONSPIRACY (Dec. 17, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/17/does-judicial-disagreement-imply-ambiguity/?utm_term=.c02cf101cd57 [https://perma.cc/7HJ9-K9S3]. Posner and Vermeule's convincing rejoinder is that "epistemic humility" should lead judges to reconsider their position on textual certainty under these conditions as well. Posner & Vermeule, *supra* note 286, at 6.

295. *See* Berzon, *supra* note 233, at 1484.

evolving scenarios may require that opportunities for dissent be channeled so as to avoid endangering personnel and civilians.[296]

In the administrative context, the question is even more nuanced. From a societal perspective, administrative dissent's benefits and costs fall into three broad categories: *substantive*, *institutional*, and *democratic*. Part III discussed the substantive impacts of dissent. The following Sections will therefore explore institutional and democratic costs and benefits of administrative dissents in more detail.

### *A. Institutional Costs and Benefits*

The institutional benefits and costs of separate statements in general, and dissents in particular, relate primarily to reputation, collegiality, and resources. In terms of institutional reputation, dissents can either be a boon, demonstrating the independence of decision makers and the seriousness with which they view their task, or a curse, depriving the institution of its reputation for solidarity and impartiality. If used as a substitute for healthy internal debate or if less than respectful in tone, separate statements can also weaken collegiality within the agency. Finally, separate statements demand commissioner and staff attention and resources, and may come at the expense of other pressing work.

#### *1. Institutional Legitimacy*

Dissents likely have no *direct* effect on a government body's decision-making legitimacy. Justice Scalia, in a 1994 lecture, defended that position as follows:

> It seems to me that in a democratic society the authority of a bench of judges, like the authority of a legislature, or the authority of an executive officer, depends quite simply upon a grant of power from the people. And if the terms of the grant are that the majority vote shall prevail, then *that* is all the authority that is required—for a court no less than for a legislature or for a multimember executive.[297]

296. *See* Masur, *supra* note 12, at 507-08.
297. Scalia, *supra* note 32, at 35.

Even Justice Scalia, however, acknowledged that the public may be less willing to accept a divided decision.[298] This and related impacts might be called the second-order effects of dissent on institutional reputation and legitimacy.

In the literature on judicial behavior, theories about the relationship between separate opinions and institutional reputation fall into three main camps. One view is that decisional unanimity is reputation enhancing, while separate opinions weaken the institution. Adherents of this view include Chief Justice John Marshall, during whose tenure the Court produced remarkably few divided opinions.[299] More than a century after Marshall first stressed the importance of unanimity, Judge Learned Hand spoke out against dissent due to its tendency to "cancel[ ] the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[300] That solidarity can reinforce outsiders' impression of the courts as impartial and fair.[301] According to Seventh Circuit Judge Diane Wood, a court's reputation and legitimacy stem, at least in part, from its status as an apolitical institution.[302] Published dissents can weaken this perception, suggesting that ours is a government of men, not of laws.[303] Even staunch supporters of dissent have recognized that, unchecked, dissent can negatively impact status and, as a result, institutional mission.[304]

Interviews with current and former Commissioners and their staff suggest that commission chairs are not blind to the reputational benefits of unanimous decisions. While more research is needed to understand the breakdown of divided votes by Chairs at various agencies, anecdotal evidence does suggest that, as in the

298. *See id.*

299. *See* G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 34 (1984). Chief Justice John Roberts espouses a similar philosophy, believing that it is the duty of a Chief Justice to secure unanimity whenever possible. *See* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ [https://perma.cc/6BLP-YQ7S].

300. LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

301. *See* Rosen, *supra* note 299 ("In [Chief Justice] Roberts's view, ... closely divided, 5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.").

302. Wood, *supra* note 10, at 1462-63.

303. *See id.* (noting that the tone of the dissent can strengthen or weaken this perception with an approach that is too "human," suggesting that politics predominate over law).

304. *See* Guinier, *supra* note 10, at 128.

courts,[305] some commission chairs prioritize unanimity more than others.[306]

A second view of the impact of dissent on an institution's reputation is that published dissents burnish, rather than weaken, that reputation. A court's reputation, according to Chief Justice Charles Evans Hughes, depends on "the character and independence of the judges."[307] Better to dissent, he concluded, than to sacrifice independence for unanimity.[308] Justice Scalia agreed, arguing that dissents make plain that the Court's "decisions are the product of independent and thoughtful minds" and that judges "do not simply 'go along' for some supposed 'good of the institution.'"[309]

Perhaps the public in particular prefers openness to ceremony.[310] Dan Kahan suggests that to conceal that a question facing the Court is difficult—even divisive—is to engage in implausible subterfuge.[311] Kahan's target was certitude in both majority and dissenting opinions, and he did not address the desirability of dissents *qua* dissents. Nonetheless, his logic suggests that unanimity in the face of genuine disagreement on the bench would cause those who disagreed with an institution's rulings to form "an exaggerated assessment" of the institution's single-mindedness, resulting in a

305. *See, e.g.*, White, *supra* note 299, at 36 (identifying the Marshall Court's seniority practice as one device for ensuring unanimity).

306. *Compare*, Timothy Karr, *FCC Chairman Wheeler Fought to Defend the Open Internet and Protect the Rights of Consumers*, FREE PRESS (Dec. 15, 2016), https://www.freepress.net/press-release/107708/fcc-chairman-wheeler-fought-defend-open-internet-and-protect-rights-consumers [https://perma.cc/MK9M-5SWG] (quoting the website's president and CEO as noting that Chairman Wheeler's legacy will be judged "not by the number of unanimous votes but by actual accomplishments"), *with* Scott J. Wallsten, *The Partisan FCC*, TECH. POL'Y INST. (Feb. 16, 2016), https://techpolicyinstitute.org/2016/02/16/the-partisan-fcc/ [https://perma.cc/WEU4-D4DQ] (reporting that FTC votes split along party lines more frequently under Chairman Tom Wheeler than under any previous commissioner dating back to 1994).

307. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES, ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 67 (Garden City Publ'g Co. 1936) (1929).

308. *Id.* at 68.

309. Scalia, *supra* note 32, at 35.

310. According to Lani Guinier, "The Supreme Court *enhances* its authority by engaging the public through tempered, direct communication." Guinier, *supra* note 10, at 115.

311. *See* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 60-61 (2011).

mischaracterization of the institution's decision makers as "deluded, dishonest, or both."[312]

Like courts, commissions are made up of experts whose independence may well enhance a commission's reputation in the eyes of sophisticated observers. Many observers, including members of the public, however, are not knowledgeable consumers of decisional substance, especially when it comes to administrative rules and orders. Few members of the public are likely to take the time to read *Federal Register* notices in their entirety and to admire the independent views of commissioners who write separately. Thus, the risk that observers will count noses rather than pay attention to the nuances of the debate is greater for agencies than for courts. In addition, agency legitimacy is more difficult to establish than judicial legitimacy,[313] making agencies more vulnerable to charges of politicization and capture. Thus the risk that dissent will signal weakness rather than strength may be more pronounced for administrative commissions than for courts. For those concerned about the effects of politics on commission decision-making, decisions that split along party lines, like those at the FCC,[314] may be particularly worrisome.

A final argument about the effects of dissent on institutional reputation, suggested by Todd Henderson, is that dissent can both weaken and strengthen institutions: its effect depends on sociopolitical context.[315] Focusing on the Supreme Court, Henderson contrasts the differing approaches taken by two Chief Justices. First, he explores Chief Justice Marshall's emphasis on unanimity "to assert the authority of the judiciary in the fledgling days of American democracy."[316] Then, he cites Chief Justice Harlan Stone's encouragement of dissent in order to avoid backlash as the Court waded into polarizing social debates during the New Deal.[317] Both strategies, Henderson contends, were attempts to enhance the

312. *See id.* Kahan noted these effects in the context of studies of motivated cognition among rival cultural groups. *Id.* at 60. But his logic applies equally well to the relationship between institutional decision makers and the public.

313. *See* Jacobs, *supra* note 25, at 589 (describing the administrative state's legitimacy deficit).

314. *See supra* Part I.B.2.

315. *See* Henderson, *supra* note 32, at 287.

316. *Id.*

317. *Id.* at 325-30.

Court's legitimacy.[318] Henderson's approach validates both theories, each of which has its own internal logic, about the relationship between dissent and reputation.[319] Essentially, Henderson concludes, the reputational effects of dissent are context-dependent.[320]

Henderson's theory helps us understand when separate opinions may be helpful in the administrative context and when they may be more costly than beneficial. Today, to an even greater extent than courts, agencies seek to build and maintain positive reputations with other institutional actors, with relevant stakeholders, and with the general public.[321] This is because agencies in general, and independent commissions in particular, occupy an uneasy position in government. Sitting somewhere between the legislative and executive, independent commissions have been dubbed a "headless 'fourth branch.'"[322] Their very constitutionality has been questioned, as have various aspects of their structures and powers.[323]

For these reasons, independent commissions have special incentives to avoid attack by burnishing their reputations as confident, reasonable regulators. However, per Henderson, whether agencies should seek to enhance their status and reputation by speaking with a single, unified voice or by being as transparent as possible about disagreement among commissioners will depend on social and political context. New commissions seeking to establish their reputations as trustworthy stewards may tend toward consensus in their early years.[324] Independent commissions might also prioritize unanimity in the face of external political opposition. By contrast,

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318. *See id.* at 338-39.

319. *See id.* at 343-44.

320. *See id.* at 331.

321. *See* Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 27-28 (2012) (exploring the relationship between agency reputation and agency autonomy); *see also* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010) (describing the FDA's efforts to build its reputation over time as a way of enhancing its own power).

322. *See* Strauss, *supra* note 26, at 578 (quoting PRESIDENTIAL COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937)).

323. *See, e.g.*, HAMBURGER, *supra* note 25, at 6-8; Lawson, *supra* note 25, at 1246-48. For a decided answer to Hamburger's question, see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing HAMBURGER, *supra* note 25) (refuting Hamburger's "dark vision of lawless and unchecked power").

324. *Cf.* Scalia, *supra* note 32, at 35 (noting that unanimity may be more appropriate "when a newly established court is just starting out").

more established bodies in more sympathetic political environments may worry less about reputation and feel freer to publicize internal disagreement.

Subject matter might also counsel discretion when it comes to the issuance of published separate statements. The NRC has elected a middle road that allows for the airing of separate views and yet presents a unified front.[325] It does so by including separate statements from each Commissioner in notational voting records available on the Agency's website, while at the same time publishing few separate opinions attached to final orders and rules.[326] This approach was likely driven by the desire to allay the public's considerable fears surrounding nuclear power through greater transparency while, at the same time, reassuring the public that safety regulations had the backing of the full Commission.[327]

Other compromise positions are possible. The reputational goals of unanimity might be served, if slightly less effectively, by separate statements that remain respectful in tone. More respectful separate statements may serve to enhance reputation by suggesting that commission decision-making is measured and dispassionate. Separate statements that are especially antagonistic to or dismissive of the commission majority, however, may undermine public trust in the commission as a whole. This is especially true if those statements go beyond merely expressing a different view and accuse the majority commissioners of blatant wrongheadedness. Most separate statements at FERC and the NRC were formal and collegial. While each Commissioner had his or her own style, many used formal language common in judicial opinions to note that they "respectfully dissent" or "respectfully dissent in part." Opinions at the FCC, however, can be less guarded.[328]

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325. *See supra* Parts I.A.1.b, I.B.1.

326. *See supra* Part I.B.1.

327. *See supra* Part I.A.1.b.

328. In his partial dissent to the D.C. Circuit opinion upholding the net neutrality rule, Judge Stephen Williams cited dissenting Commissioner Ajit Pai, but noted that the Commissioner had "us[ed] terms perhaps feistier than would suit a court." U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 762 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part). The passage to which Judge Williams referred accused the Commission of failing to produce any actual evidence of threats from paid prioritization. *See id.* (citing Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5933 (2015) (Pai, Comm'r, dissenting) (accusing the majority of "anecdote, hypothesis, and hysteria" and calling their examples "picayune and stale")).

Along similar lines, habitual dissents can suggest schisms and infighting on a commission. While such dissent might simply be the product of healthy disagreement, repeated failure to reach consensus can signal, rightly or wrongly, that politics rather than expertise is driving commission decision-making. Regular concurrences might also impact the commission's reputation, albeit in a different way. FCC Commissioners routinely attach separate concurrences to rulemaking decisions.[329] This propensity to write separately conveys the impression of the Commission as a set of individuals, rather than a unified decision-making body. In other words, although we know commissions are a "they" rather than an "it," there can be benefits to presenting a unified front, especially when dealing with a recalcitrant industry or powerful political opposition.

*2. Relationship Costs*

Collegiality on decision-making bodies can yield better quality opinions.[330] Yet separate statements can strain relationships between commissioners. Both Guinier and Wood cite the decline of collegiality and the increase of tension between judges as possible negative impacts of separate opinion writing.[331] Justice Brennan, too, believed that "[d]issent for its own sake ... can threaten the collegiality of the bench."[332] If this is true, the culprit is likely to be the *tone* of separate statements. Separate statements that are respectful of the majority may have little impact on collegiality.[333] By contrast, a dismissive or openly hostile tone in separate opinions can create bad blood.

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329. The FCC does not use the language of "concurrences," identifying them only as "separate statements." However, dissents are clearly designated.

330. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) ("[C]ollegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.").

331. Guinier, *supra* note 10, at 128; Wood, *supra* note 10, at 1463.

332. Brennan, *supra* note 31, at 435.

333. According to Justice Scalia, this is especially true when dissents and concurrences are the norm. Negative aspersions cast on dissenters will be more likely, in his view, when separate statements are rare. Scalia, *supra* note 32, at 41 (noting his close friendship with Justice Brennan, even though the two regularly dissented from each other's opinions).

As noted above, even among the small sample of commissions studied here, tone in separate opinions varied dramatically.[334] Without further study, it is not possible to say whether the critical, sometimes politicized tone in FCC separate opinions is the cause or effect of the antagonism among Commissioners that has been noted by others.[335] Even if primarily an effect of existing dysfunction, however, the hostility in many of these opinions can do little to improve relationships.

*3. Resource Costs*

Finally, writing separately can strain institutional resources. Crafting separate statements takes time and effort, pulling commissioners (and their staffs) away from other business. This time is well spent only if the benefits of writing separately outweigh its opportunity costs.[336] While the costs of separate opinions are immediate, moreover, many of their potential benefits accrue only in the medium- to long-term.[337] Taking the time to craft a separate written opinion may not be unduly burdensome on the Supreme Court, which decides in the neighborhood of eighty cases per year, and where each Justice is assigned four law clerks.[338] At an agency like FERC, however, where the agency issues as many as 5.5 decisions *per day*,[339] time devoted to drafting and issuing a separate opinion may come at the expense of other commission business.

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334. *See, e.g.*, *supra* notes 171-72 and accompanying text.

335. *See, e.g.*, Brendan Sasso, *The Increasing Politicization of the FCC*, ATLANTIC (Feb. 26, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-increasing-politicization-of-the-fcc/456579/ [https://perma.cc/Z5YP-Z9YQ] (describing the Commission's "bad blood").

336. Even Justice Holmes, the Great Dissenter, acknowledged that dissents were often "useless." N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("[A]lthough I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case."); *see* Brennan, *supra* note 31, at 429 (designating Holmes "the Great Dissenter").

337. *See* TUSHNET, *supra* note 35, at xx ("[D]issents matter, but almost always indirectly and over a long period.").

338. The number of law clerks assigned to each Justice has changed over time. *See* Barry Cushman, *Vote Fluidity on the Hughes Court: The Critical Terms, 1934-1936*, 2017 U. ILL. L. REV. 269, 302 & n.283.

339. This figure is based on estimates from a former Commissioner and is supported by the number of total annual agency decisions in Westlaw's database for Federal Energy Regulatory Commission documents.

### *B. Democratic Costs and Benefits*

The democratic costs and benefits of separate statements can be segregated into those relating to the rule of law, accountability, the quality of public discourse, and civic education and engagement.[340] By introducing uncertainty into agency pronouncements, separate statements can undermine rule of law values. And yet, as discussed in Part II.A, they can actually enhance agency accountability by facilitating oversight. As commentators have pointed out in the judicial context, moreover, dissent can contribute to the marketplace of ideas and can even fuel citizen participation in the project of governance.[341]

#### *1. Rule of Law*

If separate statements dilute the authority of majority opinions,[342] they might undermine rule of law values such as clarity and settlement.[343] For example, if two commissioners on a five-member commission concur with the outcome in a rulemaking but offer separate reasoning, and one commissioner dissents, it may be unclear whose logic governs. Regarding settlement, separate opinions can encourage opponents to challenge the agency decision in court, thus leading to lengthy legal proceedings that place the future of the regulation in doubt.[344] Even if the regulation is upheld, a split on a

340. While rule of law is not an essential component of democracy in the abstract, it has become a defining feature of American democracy. *See, e.g.*, Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001) (identifying "[t]he rule of law [a]s a cornerstone" of our democracy). For a nuanced discussion of the broader relationship between rule of law values and democracy, see generally Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 EUR. J. PHIL. 12 (1995).

341. *See, e.g.*, Brennan, *supra* note 31, at 430; Guinier, *supra* note 10, at 47-52.

342. *See* TUSHNET, *supra* note 35, at xiii.

343. *See* Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y.C. L. REV. 391, 420 (2004) (citing Ruth Bader Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FED. B. NEWS & J. 199 (1992) (arguing that dissents should be used sparingly)); *see also* Wood, *supra* note 10, at 1463 (noting that dissents detract from law's clarity).

344. *Cf.* Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 189 (2014) (noting that rulemaking may trigger legal challenges that create uncertainty); Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1842 (2011) (noting that legal challenges to regulations that result in prolonged uncertainty may be more likely when regulations are "based on poorly developed facts"). Wu's argument might be extended to cover regulations whose

commission signals that a future policy change is more likely.[345] If the law's legitimacy depends in part on its orderly development, then separate opinions complicate the picture.[346]

The extent to which separate opinions undermine certainty and predictability will depend on their frequency and content. Persistent dissents,[347] especially those involving more than one commissioner, might undermine the predictability of policy evolution over time, since a change in personnel or a change of heart by a single commissioner could result in a change in commission approach.[348]

Especially when the substance of the rulemaking is particularly controversial, lengthy, detailed, and/or impassioned, dissents might provide ammunition to parties seeking to overturn the decision. While these rules will almost certainly be challenged, regardless of any divisions on the Commission, reviewing courts might be more sympathetic to parties who are able to cite at least one commissioner in support of their position, potentially prolonging litigation. It is likely, for example, that the D.C. Circuit would not have been so sympathetic to the challengers' arguments in *Electric Power Supply Ass'n v. FERC* had Commissioner Moeller not authored such a lengthy dissent from the underlying rule.[349] While the Supreme

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factual predicates are well-developed but where commissioners disagree about the import of those facts. *See id.* at 1848-50.

345. Such reversals of agency policy are typically upheld by the courts as long as the agency shows that there are good reasons for the new policy (even if they are not better than the reasons supporting the old one). *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

346. *See* Guinier, *supra* note 10, at 128. For a more extreme version of this argument, consider Justice Louis Brandeis's position that settling a legal principle could be more important than getting it right. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

347. Such persistent dissents are not rare in the courts, Fried, *supra* note 235, at 178 (noting that only explicit commitments to dissent until policies are changed are rare, not persistent dissents themselves), and they occur at commissions as well. Consider FERC Commissioner Bill Massey's persistent dissents on matters related to FERC's handling of the western energy crisis or FERC Commissioner Suedeen Kelly's persistent dissents on matters related to the application of the *Mobile-Sierra* doctrine to settlement documents. *See, e.g.*, regulations cited *supra* note 173 and *infra* note 370.

348. *Cf.* Fried, *supra* note 235, at 192-93 (examining the special problem of persistent dissenting blocs on a multimember court).

349. 753 F.3d 216 (D.C. Cir. 2014), *rev'd on other grounds*, 136 W. Ct. 760 (2016); *see also supra* Part III.B.1.

Court ultimately overturned the D.C. Circuit's holding 6-2,[350] the years of uncertainty surrounding demand response's future in wholesale electricity markets delayed deployment of at least some market programs.[351] Similarly, the two Republican Commissioner dissents from the FCC's net neutrality rulemaking have already been seized upon by challengers in their efforts to overturn the rule,[352] a task that has become much simpler with the recent appointment of Commissioner Pai, one of the original dissenters, to lead the Commission.[353]

*2. Accountability*

By providing more transparency and insight into institutional decision-making, separate opinions can facilitate democratic accountability.[354] Part II explained in greater detail how separate statements might facilitate agency oversight by Congress and the President. But they can also enable oversight by stakeholders and by the public at large. Guinier has argued that published separate opinions can make a court more democratically accountable by subjecting more of its reasoning to public scrutiny.[355] Thomas Jefferson

350. *See* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 784 (2016).

351. Some markets, such as ISO New England, delayed full integration of demand response resources pending the outcome of the litigation. HENRY YOSHIMURA, ISO NEW ENG. INC., CONTINGENCY PLAN ADDRESSING THE POTENTIAL LOSS OF FERC JURISDICTION OVER DEMAND RESOURCES 2 (2015), https://www.iso-ne.com/static-assets/documents/2015/04/iso_paper_contingency_plan_addressing_potential_loss_of_ferc_jurisdiction_over_dr_04_17_15.pdf [https://perma.cc/N7M5-ZL9W] ("[T]he planned June 1, 2017 implementation for full integration of demand response resources ... should be postponed at least a year to allow for more clarity and direction regarding the future state of demand response.").

352. *See* Joint Brief for Petitioners *passim*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063).

353. *See* Harold Furchtgott-Roth, *President Trump Designates Ajit Pai as Chairman of FCC*, FORBES: OPINION (Jan. 22, 2017 12:54 PM), https://www.forbes.com/sites/haroldfurchtgottroth/2017/01/22/president-trump-designates-ajit-pai-as-chairman-of-fcc/332bc411577a [https://perma.cc/LR2J-KF43].

354. This is especially true because commissioners are uniquely positioned to identify procedural violations within the agencies.

355. *See* Guinier, *supra* note 10, at 117-22. Guinier emphasizes that this accountability is particularly important if the court is "homogen[ous]" and "isolated from sources of innovation." *Id.* at 123. Independent commissions may indeed be subject to the former tendency, if not the latter.

went further, suggesting that signed, seriatim opinions were the way to hold life-tenured federal judges accountable to the public.[356]

Commissioners are not judges, and there are indirect ways to hold them accountable, including via the political oversight mechanisms discussed in Part II and through the President's authority to remove them for good cause. But separate statements are unique in that they offer a window into commission decision-making and commissioner preferences. However, not all transparency is created equal. To serve a useful accountability function, separate statements must be both *comprehensible* and *available*. They must also not occur with such frequency as to become background noise.

First, in order to enhance commission accountability to the public, separate statements must be *comprehensible*. They should be (and typically are) drafted in plain English such that the public can comprehend their critiques.[357] To an even greater extent than judicial separate opinions, commissioner separate statements are often less formal and far more understandable than the majority decision. Majority rulemaking decisions are often drafted for technical audiences and are notoriously dense. If certain issues are too technical for communication to a lay audience, separate statements should at least be accessible to media representatives who can translate key ideas for the public.

Separate statements must also be *available*. Statements that are embedded in the decision document published in the *Federal Register* are technically available to the general public. However, the placement of the separate statements within those documents matters. Embedding the statements in the middle of a lengthy document, as the NRC sometimes does,[358] makes them less visible than appending them to the end of the document, where they can be found quickly. Similarly, while the NRC's transparency in making earlier-stage decision documents (including earlier-stage separate statements) available on its website is admirable, these documents are unlikely to reach a broader audience. For one thing, locating the documents requires navigating a fairly complex series of links. For another, the documents are not sorted by rulemaking activity or

356. *See* Henderson, *supra* note 32, at 304-07.

357. *Cf.* Guinier, *supra* note 10, at 117 (celebrating Justice Scalia and Justice Ginsburg for using clear language in their dissents).

358. *See supra* note 127 and accompanying text.

topic, making it difficult to link a particular early-stage decision document to a published rulemaking decision. Especially when these separate statements at an early stage in the process substitute for published separate statements from final decisions, accountability functions are less well served if statements are difficult to locate.

*3. Public Discourse and Civic Engagement*

Finally, separate opinions can enhance democracy by contributing to the "marketplace of ideas" and by facilitating civic education and engagement. The "marketplace of ideas" was itself first articulated in a dissent by Justice Oliver Wendell Holmes in *Abrams v. United States*.[359] While Holmes's conception was relatively narrow,[360] the "marketplace of ideas" has grown to stand for broader conceptions of free and open discourse that are valuable in their own right and that may help us all to make better choices. Heather Gerken, for example, emphasizes the "Millian view that exposure to a wide range of views improves the quality of our decisions."[361] Commissioner separate statements, by providing alternative viewpoints, can enhance the range of available ideas both within and without the agency. For example, in a dissent from a 2012 order, FERC Commissioner John Norris highlighted the costs of electricity reliability standards which would be borne by consumers.[362] Norris noted that he hoped his "comments ... w[ould] help generate a dialogue on how economics and reliability fit together."[363]

The authors of separate opinions might also be seen as modeling freedom of speech and expression. According to Justice Brennan, "None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely

359. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

360. *See* Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1166-67 (2015) (suggesting that Holmes was concerned primarily with competition "among normative moral, ideological, or political programs").

361. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005).

362. *See* Transmission Planning Reliability Standards, 77 Fed. Reg. 26,686, 26,696 (Apr. 19, 2012) (Norris, Comm'r, dissenting in part and concurring in part) (to be codified at 18 C.F.R. pt. 40).

363. *Id.*

maintained, is to violate some unwritten law of manners or decorum."[364] "[W]e encourage debate," he continued, and "we do not shut down communication as soon as a decision is reached."[365] Of course, to the extent that authors of separate statements are indeed modeling discourse, tone matters. Statements that are too dismissive of their colleagues' views or overtly disrespectful risk instilling the wrong kind of values in ordinary citizens.

Finally, concurrences and dissents might also contribute to civic education and engagement. "Above all," Guinier reminds us, "dissenting opinions teach."[366] Separate statements can be less formal in tone and approach than majority issuances, and can speak directly to the citizenry.[367] They can also elaborate on possible applications of the majority opinion and on ways in which it might be distinguished,[368] thus providing citizens with more information about the decision's likely effects.

Separate statements can play a particularly important educational role when they highlight the rights of the less powerful. W. Stanfield Johnson has explained that the dissents of Judge Pauline Newman from the Federal Circuit "respectfully but emphatically criticize her colleagues for not recognizing legitimate interests of contractors and citizens seeking remedies from the Government."[369] Some FERC dissents play a similar role in highlighting the needs of residential energy consumers. In a concurrence attached to a Commission fact-finding order related to the California energy crisis, for example, Commissioner Bill Massey highlighted the plight of the Californian consumers who "paid the exorbitant prices of California's dysfunctional market."[370]

Not everyone agrees that judicial opinions are effective educational tools.[371] The basis for this claim is that the public is largely

364. Brennan, *supra* note 31, at 437.

365. *Id.*

366. Guinier, *supra* note 10, at 58.

367. *Cf.* Brennan, *supra* note 31, at 430 (citing his own experience recommending, for example, that litigants seek redress in a different forum).

368. *See id.*

369. W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors,"* 40 PUB. CONT. L.J. 275, 276 (2011).

370. Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108, 61,290 (2003) (Massey, Comm'r, concurring).

371. *See, e.g.*, Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 565-69 (2009) (claiming that judicial opinions "[n]either [e]ducate nor [t]each").

unaware of either the outcome or the content of judicial decisions.[372] Whatever the strength of that claim in the judicial context, it is more likely to hold true at the agency level in all but the highest profile rulemakings. Nevertheless, the media, which play a key role in dissemination of legal developments to the broader public, already capture administrative dissents. In fact, administrative dissents make good news because they lend drama to what might otherwise be dry, technical proceedings. Thus, there is every reason to think, especially with more media engagement, that separate statements can enhance civic engagement and public discourse.

## CONCLUSION

This Article has sought to demonstrate that administrative dissents and concurrences are worthy of study in their own right. They offer insights into independent commission decision-making, reminding us that commissions are in fact collections of individuals, rather than monolithic entities. They underscore the heterogeneity of commission processes and cultures. Although separate statements have costs as well as benefits, they play a key role in bolstering agency accountability and checking administrative arbitrariness.

More work remains to be done. No single commission appears to have all of the answers when it comes to the drafting and publication of separate statements. Each demonstrates some best practices and provides some cautionary tales. A helpful first step for agencies seeking to improve their own practices would be for agency staff to research the approaches of their fellow commissions. The FCC has recently undertaken such a project in the wake of criticism over promulgation of the Open Internet rule, creating a task force to compare the FCC's approach to those of other agencies and to distill recommendations.[373] Agencies such as FERC may benefit from a similar undertaking, if only as a prophylactic. FERC lacks written procedures on draft circulation, for example, which could facilitate more dialogic decision-making. There is value in diversity,

372. *See id.* at 566.

373. *See* Diane Cornell, *Task Force on FCC Process*, FCC: BLOG (July 21, 2015, 11:38 AM), https://www.fcc.gov/news-events/blog/2015/07/21/task-force-fcc-process [https://perma.cc/3BY9-LXJU].

and uniformity across commissions could stifle rather than promote procedural innovation. Nevertheless, the utility of such innovation is limited if lessons are not diffused across the administrative state.

Academics, too, have a role to play. Countless features of commissioner separate statements remain to be explored. What accounts, for example, for the fluctuating rates of dissent and concurrence over time at individual commissions? Are they the product of changes in internal culture, including chair turnover? Responses to exogenous events or docket composition? Commissioner personality? Something else? Building on the institutional and theoretical work of this Article, a positive theory of why commissioners dissent could address all of these questions and more.

The spotlight, of course, comes with dangers of its own, and drawing more attention to commissioner separate statements presents risks. As noted in Part III, there is the risk of gamesmanship if courts give separate statements too much weight in reviewing agency action. Moreover, as the climate in Washington becomes increasingly polarized, commissioners might increasingly be tempted to use separate statements to signal political commitments and loyalties. To the extent that these motivations eclipse the substantive, institutional, and democratic benefits outlined here, separate statements could become more vice than virtue.

And yet, the risk of unintended consequences can be mitigated and should not deter further inquiry. This preliminary assessment of administrative dissents and concurrences demonstrates that commission decision-making is more fractured than the standard account would indicate. But it is only by embracing the administrative state in all its messiness and complexity that we can truly understand both its limitations and its possibilities.