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## Antipolitics and the Administrative State

Cary Coglianese\* and Daniel E. Walters\*\*

In reflecting on his service as the head of the United States Office of Information and Regulatory Affairs (OIRA), Cass Sunstein has shared his disdain for having politics—understood as “public reactions and electoral factors”—affect OIRA’s regulatory analysis and administrative decision-making.<sup>1</sup> According to Sunstein, “on the rare occasions when members of [OIRA’s] staff pointed out the views of interest groups”—as if officials should just determine “which groups favor or oppose a proposed rule” and then design a policy “that would please some without displeasing others”—he would be outright dismissive.<sup>2</sup> “That’s sewer talk,” he would say, telling his staff: “Get your mind out of the gutter.”<sup>3</sup>

Sunstein’s adverse reaction to having politics play a role at his former office reflects an antipolitical way of thinking about the administrative state. His view is far from idiosyncratic. Although the United States government most visibly operates on the basis of democratic politics, the hundreds of offices that do most of the governing—that is, the alphabet soup of agencies such as the EPA, FCC, FDA, IRS, and OSHA—are headed by officials and civil servants whom no one elected and who often conduct their work outside the partisan glare that constitutes day-to-day democratic politics. For many citizens, leaders, and scholars, this state of affairs is admirable.<sup>4</sup> By insulating key decision-makers from elections, the administrative state gives room for experts to make decisions on the basis of technocratic expertise.<sup>5</sup> As Sunstein has put it, often the important questions are not the political ones; they are the pragmatic ones about “what policies and regulations will actually achieve.”<sup>6</sup>

Of course, a technocratic view of administrative agencies is far from universally held. Scholars of public administration and administrative law have long advocated for a “place for politics” in regulatory decision-making,<sup>7</sup> recognizing that an unwavering commitment to expert administration runs in tension with principles of democratic, accountable government.<sup>8</sup> Indeed, today the very office that Sunstein once oversaw has been directed to accommodate a more politically conscious vision of the regulatory process by seeking “to proactively engage interested or affected parties.”<sup>9</sup> The question of whether the administrative state should be antipolitical and technocratic, or political and

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<sup>1</sup> Sunstein, “The Office of Information and Regulatory Affairs,” 1873.

<sup>2</sup> Sunstein, *Simpler*, 4–5.

<sup>3</sup> Sunstein, *Simpler*, 4–5.

<sup>4</sup> See Lewis, *The Fifth Risk*, Ch. 2.

<sup>5</sup> See Feinstein, “Legitimizing Agencies,” pp. 16, 49–50.

<sup>6</sup> Sunstein, *Simpler*, 6.

<sup>7</sup> See Watts, “Proposing a Place for Politics.” For additional arguments in defense of political decision-making in the administrative process, see Mashaw, “Prodelegation”; Walters, “The Administrative Agon”; and Blank and Osofsky, “Democratizing Administrative Law.”

<sup>8</sup> Edley, *Administrative Law*, 72.

<sup>9</sup> Biden, “Executive Order.”

democratic, has been a longstanding one. We have no intention of definitively answering it here. An important prior question—the one we do consider here—is what exactly it means for the administrative state to be antipolitical. Assuming that there is value in keeping administrators out of the “gutter,” precisely what does the gutter look like?

Our answer proposes two conceptions of antipolitics in the administrative state. The first places primacy on technocratic expertise in administrative decision-making to the exclusion of discretion by administrators in making value choices. This view has been widely expressed in both public and scholarly commentary, such as whenever one hears the claim made that administrative decision-making must be “based” on, or mechanistically “follow” from, science. Agency officials inevitably make policy decisions that entail politics in the sense of making value judgments and policy choices. As such, administrators’ decision-making simply cannot be based on technocratic judgment alone. With any governing decision, some people win while others often lose—and, even when “win win solutions” are truly possible, some people win more than others. It is unavoidable for administrators to be political in this sense, because the mere exercise of governing determines who gets what, when, and how.

The necessity of making value judgments, though, does not mean that expertise ought not to matter—nor does it mean that, politically, anything goes. We draw out a second understanding of antipolitics, one that aspires toward an administrative state devoid of self-interested decision-making by administrators and their political superiors. This conception allows for, and even requires, consideration of how policies will affect different interests in society, but the purpose in doing so is to ensure that administrators exercise their discretion in a manner that advances broad public values, rather than the narrow interests of administrators or their friends and allies. This second view makes public administration antipolitical, at least relatively so when judged in comparison with the realm of electoral politics. This second view also fits well with the kinds of legal doctrines that have developed to keep the administrative state antipolitical—and we think it is this view that should guide disdain for “sewer talk” by administrators.

### Administration as Antipolitics

In introducing part one of the symposium on antipolitics in this journal, Jeffrey Perl suggested that “we should look deeply into any precedent for reducing the role of politics and partisan zeal in the life of our democracies.”<sup>10</sup> One precedent would be Max Weber’s conception of bureaucracy, offered a century ago, as a professional, impersonal, and rule-bound mode of governance that lies outside the political sphere.<sup>11</sup> In the United States, that precedent may go back even farther, to the early Progressive Era, when the modern administrative state began to take root.<sup>12</sup> As Sharon Jacobs has recounted, by the early twentieth century two basic expectations of the incipient administrative state had crystallized. First, agencies were supposed to be like a “transmission belt,” meaning that they were expected to “put discrete statutory mandates into practice” and “exercise minimal discretion.”<sup>13</sup> Second, agencies were expected to “make decisions based on data and expertise.”<sup>14</sup> According to James Landis, perhaps the leading expositor in the early

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<sup>10</sup> Perl, “Introduction: “The First Duty of Grown, Thinking People,”” 214.

<sup>11</sup> See Weber, *Economy and Society*.

<sup>12</sup> See Wilson, “The Study of Administration.” See also Novak, *New Democracy*; and Emerson, *The Public’s Law*.

<sup>13</sup> Jacobs, “The Administrative State’s Passive Virtues,” 604.

<sup>14</sup> Jacobs, “The Administrative State’s Passive Virtues,” 606.

twentieth century of this technocratic view of administration, “with the rise of regulation, the need for expertness became dominant.”<sup>15</sup> This view permitted little room for politics to enter into the equation for administrators. Political considerations should be confined to the electoral arena; the administrative state was seen to serve a very different, and fundamentally antipolitical, purpose.

Antipolitical impulses were not only a matter of high theory; they were translated into institutional designs and legal doctrines, many of which are still with us. These doctrines were designed to ensure varying degrees of independence for agencies from ordinary politics. Some early architects of the “regulatory commission” model in the United States believed, for instance, that such institutions could function as “expert, permanent, apolitical bod[ies].”<sup>16</sup> Following this lead, Congress structured many agencies, such as the Federal Trade Commission and the Federal Reserve, to retain independence from elected officials.<sup>17</sup> Likewise, the civil service triumphed over the spoils system with the aid of legislation, such as the Pendleton Act of 1883,<sup>18</sup> which instituted a professionalized class of tenure-protected employees who, as Landis desired, could “devote fifty-two weeks a year, year after year, to a particular problem.”<sup>19</sup>

In short, the idea that the administrative state ought to bracket political conflicts and replace them with depoliticized, and ostensibly neutral, decision-making criteria has been said to be “hard-wired into the design of the administrative state.”<sup>20</sup> And although this “geek squad” model of agency-as-expert has eroded to some degree,<sup>21</sup> even today wistful paeans to the virtues of technocratic, bureaucratic governance are ubiquitous in discussions of regulation and the bureaucracy. Before becoming a Supreme Court justice, Stephen Breyer sang the praises of a “depoliticized regulatory process” that “might produce better results, hence increased confidence, leading to more favorable public and Congressional reactions.”<sup>22</sup> Scholars continue to draw attention to the importance of apolitical expertise in administration,<sup>23</sup> and they decry attempts at the politicization of agencies, as for instance when President Trump proposed to reclassify many civil servants so that they were no longer subject to various protections.<sup>24</sup>

If anything, public discourse about the administrative state’s policy-making powers may be even more antipolitical than discourse among scholars. Overall, the public appears to have a generally sanguine view of the capacity of expertise to provide solutions to public problems.<sup>25</sup> A recent study by Brian Feinstein finds that ordinary people tend to prefer that agencies be run by politically insulated, expert decision-makers.<sup>26</sup> Similarly, William

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<sup>15</sup> Landis, *The Administrative Process*, 23–24.

<sup>16</sup> McCraw, *Prophets of Regulation*, 8.

<sup>17</sup> See Kovacic and Winerman, “The Federal Trade Commission”; Conti-Brown and Wishnick, “Technocratic Pragmatism.”

<sup>18</sup> See Shaw, “Partisanship Creep.”

<sup>19</sup> Landis, *The Administrative Process*, 23–24.

<sup>20</sup> Wagner, “A Place for Agency Expertise,” 2023.

<sup>21</sup> Wagner, “A Place for Agency Expertise,” 2024–25.

<sup>22</sup> Breyer, *Breaking the Vicious Circle*, 55–56.

<sup>23</sup> See Araiza, *Rebuilding Expertise*; Sunstein, *The Cost-Benefit Revolution*; Whelan, “Executive Capture of Agency Decisionmaking.”

<sup>24</sup> See Verkuil, “Policymaking Accountability”; Moynihan, “Public Management for Populists.”

<sup>25</sup> See Besley, “Most Americans Do Trust Scientists.” Of course, we do not mean to suggest that faith in scientific expertise is absolute; some evidence exists that faith in science is eroding as it has become more politicized. See Jewett, “How Americans Came to Distrust Science.”

<sup>26</sup> See Feinstein, “Legitimizing Agencies.”

Araiza has asserted that agencies lose public trust through a process held “guilty by association” when they are perceived to have too close of a relationship with politics.<sup>27</sup> In other words, politics belongs in the proverbial gutter.

But what exactly does it mean for the administrative state to eschew politics? Political scientists have long defined politics as fundamentally about the “authoritative allocation of values”<sup>28</sup>—or about who gets what, when, and how.<sup>29</sup> The term *antipolitics* has arisen more recently and is used in different ways across the humanities and social sciences. Sometimes it is invoked normatively or prescriptively, as an ideal of disengagement from formal politics.<sup>30</sup> At other times, it is used to describe prevailing social trends toward disengagement, disaffection, and lack of interest in politics and collective institutions, often with strong undertones of concern about these trends and what they portend for the health of democracies.<sup>31</sup> While there are many interesting empirical questions about antipolitics and the administrative state worth considering, here our emphasis rests with the normative or prescriptive dimension of the concept—the notion that politics should be minimized or eliminated from administrative governance.<sup>32</sup>

### Antipolitics as Antidiscretion

The first way of removing politics from administrative governance is to establish the primacy of decision-making “based” on science and expertise.<sup>33</sup> Administrative agencies do generally have a greater capacity than other governing institutions to develop, digest, and deliberate over expert knowledge relevant to policy.<sup>34</sup> It has thus become commonplace to hear various formulations of the belief that scientific and expert judgment would be able independently to supply a sound basis for public policy decisions, if it were not for the pesky interference of politicians and special-interest groups. After all, as a common aphorism proclaims, surely there must be no Democratic or Republican way to pave a street. And today, especially on policy issues that touch on matters involving technology, health care, and the environment, appeals to technocratic expertise abound as a basis for the legitimacy of the administrative state.

Consider, for instance, the authority of the United States Environmental Protection Agency (EPA) to set national air-quality standards. The EPA is supposed to set these standards at levels that are “requisite to protect public health” and that provide “an adequate margin of safety.”<sup>35</sup> To many, this mandate seems to require the EPA to make technocratic judgments. Indeed, it has proven useful for EPA officials to claim that standard-setting is entirely technocratic—that all they have to do is “go where the science takes us.”<sup>36</sup> In defending proposed revisions to the agency’s air-quality standards before committees of

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<sup>27</sup> Araiza, *Rebuilding Expertise*, 3-4.

<sup>28</sup> See Easton, *Systems Analysis of Political Life*; Easton, *Political System*.

<sup>29</sup> See Laswell, *Politics*.

<sup>30</sup> See Perl, “Introduction: Suffocation in the *Polis*”; Konrád, *Antipolitics*; Hopkin, *Anti-System Politics*.

<sup>31</sup> See Hay, *Why We Hate Politics*; Glaser, *Anti-Politics*; Wood, “Politicisation, Depoliticisation, and Anti-Politics”; Stoker, “The Rise of Political Disenchantment.”

<sup>32</sup> See Beveridge and Featherstone, “Introduction,” 438: “In political theory, as well as wider humanities and social science research, ‘anti-politics’ means the eradication of ‘politics,’ that is contest, contingency and the public realm.”

<sup>33</sup> See Webb, Kurtz, and Rosenthal, “The Erosion of Science-Based Regulation.”

<sup>34</sup> Araiza, *Rebuilding Expertise*, 195–96; Fisher and Shapiro, *Administrative Competence*, 49-50.

<sup>35</sup> 42 U.S.C. § 7409(b)(1).

<sup>36</sup> Coglianese and Marchant, “Shifting Sands,” 1271.

Congress, for example, one EPA administrator argued that “the science leads us to the new, stronger standards,” imploring the agency’s critics simply to “listen to science.”<sup>37</sup>

As much as science and expertise are crucial in making informed policy judgments, however, technocratic expertise cannot be the exclusive means.<sup>38</sup> Politics—determining the allocation of values—is unavoidable and therefore ubiquitous. The act of making an administrative decision or establishing a regulatory policy, especially within a large pluralist democracy, involves making value choices, tradeoffs, and compromises. With EPA air-quality decisions, for instance, the question always arises: How much risk is too much risk? Many common air pollutants, such as ozone and particulate matter, exhibit no known threshold below which exposure causes no adverse health effects. Any exposure to these pollutants will have some negative health effects, and setting a standard at zero would compel the entire economy to shut down, bringing its own adverse effects on public health.

Ultimately, a value judgment must be made: How should one person’s life and health be valued and compared to that of others? Science cannot answer this question, and questions like it abound. Should banking agencies use public funds to make depositors whole when a bank collapses? Should financial regulators control cryptocurrency markets? Should immigration officials deport upstanding residents who made an unauthorized border crossing but did so as children, brought into the country in the arms of parents surreptitiously seeking residence? Should a small business get a loan even in the face of uncertainty over its ability to repay? Should costs be imposed on businesses today to protect people in the future? To what degree should new technologies, such as those of artificial intelligence, be required to demonstrate their safety before they can be deployed?

David Levi-Faur puts the point we are making this way: “Regulatory agencies are highly politicized, even if politics within these organizations seem different than in the electoral arena.”<sup>39</sup> The administrative state cannot be antipolitical if what we mean by politics is making value judgments and decisions that will result in winners and losers. But just because a purely technocratic application of administrative discretion is unattainable this does not mean that an ethic of “anything goes” is necessarily the upshot.

### Antipolitics as Antifavoritism

A different form of antipolitics can, and should, be part of the fabric of any administrative state. Unlike the kind that opposes administrative discretion, this type of antipolitics actually reinforces the presence of democratic politics in the administrative process but on terms that are open and fair. One reason people have an aversion to politics generally is because of its association with opportunism and self-interest.<sup>40</sup> When any government institution has the power to determine who gets something of value, that institution will be able to play favorites and ensure that one person, one group, or one cause comes out on top to the detriment of others.<sup>41</sup>

Concern about corruption, self-dealing, and concentrated power in the administrative state runs deep and, historically, has inspired many key reforms.<sup>42</sup> One reform, which Nicholas Parrillo calls the “salary revolution,” replaced a system of

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<sup>37</sup> Coglianese and Marchant, “Shifting Sands,” 1271.

<sup>38</sup> See Wagner, “The Science Charade.”

<sup>39</sup> Levi-Faur, “Regulatory Excellence,” 228.

<sup>40</sup> Hay, *Why We Hate Politics*, 62.

<sup>41</sup> See Mashaw, *Greed, Chaos, and Governance*.

<sup>42</sup> Ernst, *Tocqueville’s Nightmare*, 139–42.

administration largely structured around service fees for government officials with a more fixed source of remuneration that reduced incentives to use government for “pecuniary self-interest.”<sup>43</sup> As Jon Michaels notes, this reform was “just the start of an even larger revolution in running the government, in essence, *like a government*,” rather than like a business.<sup>44</sup>

Another step in the same direction was taken through reform of the civil service. For much of the early history of the United States, government employment was based on political favor, even down to the most basic of jobs. The “spoils system” gave to the party of the sitting president the power to reward political supporters with positions in the administration, which not only supplied pecuniary rewards but also reinforced sycophantic fealty to political leaders.<sup>45</sup> Starting with the Pendleton Act in 1883, most government employees have instead been hired through competitive processes and then insulated from political pressures. Although such antifavoritist protections of the civil service appear under some stress over the last few decades—both by certain uses of privatization (“contracting out”) and by an aggressive use of acting agency heads and other strategies for making appointments that are unambiguously political<sup>46</sup>—the civil service remains a bulwark against favoritism in the American administrative state.

Other structural safeguards, moreover, are intended to mitigate incentives to engage in political favoritism. Most notably, a number of administrative agencies are considered “independent,” meaning that they have, by statute, some degree of institutional detachment from the elected administration.<sup>47</sup> Some political appointees serve fixed terms, for instance, and cannot be removed from office without a showing of cause beyond mere political disagreement with the president.<sup>48</sup> This formal independence has been limited by the courts in recent years,<sup>49</sup> but thus far the essence of the independent-agency model has remained intact.

Still, the administrative state remains vulnerable to manipulation and control by its own targets of regulation. “Regulatory capture theory” posits that regulation is “acquired by the industry and is designed and operated primarily for its benefit.”<sup>50</sup> Today, complaints come from both Right and Left that regulation is working to the disadvantage of the overall public.<sup>51</sup> The Left decries a regulatory system that promotes the interests of corporations and billionaires, while the Right levels charges of “deep state” conspiracies. Although the best evidence suggests that both sets of complaints are (in varying degrees) overstated,<sup>52</sup> the preoccupation with “capture” within the field of administrative law reflects well the general impulse against favoritism.

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<sup>43</sup> Parrillo, *Against the Profit Motive*, 9.

<sup>44</sup> Michaels, “Running Government Like a Business,” 1159.

<sup>45</sup> See Shaw, “Partisanship Creep.”

<sup>46</sup> See Verkuil, *Valuing Bureaucracy*; Lewis, *Politics of Presidential Appointments*; O’Connell, “Actings”; Kinane, “Control without Confirmation.”

<sup>47</sup> Datla and Revesz, “Deconstructing Independent Agencies,” 774. Even agencies that are not formally independent have a claim to a degree of autonomy based on the statutory authorizations that they must carry out. See Coglianesi, “The Semi-Autonomous Administrative State.”

<sup>48</sup> See Lewis and Selin, “Political Control and the Forms of Agency Independence.”

<sup>49</sup> See Sitaraman, “The Political Economy of the Removal Power”; Mashaw, “Of Angels, Pins, and For-Cause Removal.”

<sup>50</sup> See Stigler, “The Theory of Economic Regulation”; Carrigan and Coglianesi, “Capturing Regulatory Reality.”

<sup>51</sup> See Lindsey and Teles, *Captured Economy*; Carpenter, “Corrosive Capture?”

<sup>52</sup> See Scheffler, “Failure to Capture.”

Administrative law in the United States has incorporated a number of rules intended to safeguard against capture. One set of requirements calls for transparency in government on the grounds that “sunshine is the best disinfectant” for the corrupting influence of favoritism.<sup>53</sup> Another widely recognized example is the requirement that agencies supply reasons for their actions, subject to judicial review for arbitrariness.<sup>54</sup> Under the Supreme Court’s decision in *Motor Vehicle Manufacturers Association v. State Farm*, agencies must offer reasons and supporting evidence based on factors made relevant by the statute each agency administers.<sup>55</sup> Judicial decisions in recent arbitrariness cases have prevented agencies from relying on pretextual justifications, thus making it even harder for agencies to play favorites.<sup>56</sup> Of course, neither transparency nor reason-giving requirements always prevent favoritism. Some administrative decisions, including decisions *not* to do something, are simply not subject to meaningful reason-giving requirements or subject to meaningful judicial review.<sup>57</sup> Likewise, the agenda-setting process at agencies remains something of a black box, and scholars have argued that the early part of the regulatory process provides ample opportunities for the influence of special interests.<sup>58</sup>

Still, the key requirement of administrative law—that agencies be able to provide impersonal reasoning for their actions—reveals a clear antipathy toward politics as an expression of favoritism. Although it cannot be denied that administrative discretion entails making value judgments, those judgments must be made on defensible grounds of principle. Decisions grounded in what will best advance the interests of administrators, their elected overseers, or their friends with money, power, and resources are, to say the least, deficient.

### Politics and Antipolitics in the Future Administrative State

Distinguishing between antipolitics as opposition to favoritism and antipolitics as opposition to discretion can hold important, even vital, implications for the future of the administrative state. Doing so may help policymakers to focus reforms where they are most needed—on practices that threaten to undermine the public’s confidence in the public-mindedness of administration, rather than on practices that, properly conceived, are constitutive of the very enterprise of administration within a liberal democracy.<sup>59</sup> Recently, populists rallying against the administrative state have sought its “deconstruction” (to use a term often, though ineptly, applied in this context).<sup>60</sup> Their aim is to undermine the very idea of expertise, which underwrites the kind of antipolitics that is opposed to the exercise of political discretion in making policy and administrative decisions. Given populists’ track record in turning traditional sources of knowledge (and even the rule of law) into

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<sup>53</sup> Kwoka, *Saving the Freedom*.

<sup>54</sup> See Stiglitz, *Reasoning State*; Mashaw, *Reasoned Administration*; Croley, *Regulation and Public Interests*.

<sup>55</sup> *Motor Vehicle Manufacturers Association v. State Farm*; see also *Massachusetts v. EPA*, 532-33.

<sup>56</sup> *Department of Commerce v. New York*.

<sup>57</sup> See Coglianese, Scheffler, and Walters, “Unrules”; Walters, “Symmetry’s Mandate”; Sunstein and Vermeule, “The Law of ‘Not Now.’”

<sup>58</sup> See Acs and Coglianese, “Influence by Intimidation”; West, “Inside the Black Box.”

<sup>59</sup> See Kettl, “Weberian Bureaucracy.”

<sup>60</sup> See Krieg, “What the ‘Deconstruction of the Administrative State’ Really Looks Like.”



“scapegoats,”<sup>61</sup> expertise may well turn out to be inadequate as a basis on which to build a defense against populism’s dangers, such as tendencies toward authoritarianism.<sup>62</sup>

To resist the rise of exclusive, and false, populist claims to representation of “the people,” it may be better to recognize the limits of expertise and be forthright about the administrative state’s irreducible space for political contestation.<sup>63</sup> Fostering an appreciation for the existence of administrative discretion, while embracing this political dimension of administration openly and fairly, may be what is needed to beat back populist efforts to seize control of the instruments of government. After all, administrative agencies have their own, proper reasons to encourage public participation in determining policy and to mediate societal conflicts without resorting to favoritism. Doing so may help revise the assumption of many that government is subject, even in democracies, to the interests and whims of powerful figures. For these reasons, a commitment to exclude favoritism would seem to demand a corresponding commitment to public engagement in administrative processes. When agencies seek out the views of the public in a broad and inclusive manner before making decisions, they embrace a form of politics in the administrative process that runs counter to the strict and unrealistically technocratic posture of the type of antipolitics that is opposed to political discretion in decision-making. The very existence of discretionary decision-making ought to drive agencies to listen to and learn from the views of all those affected by their policies and regulations.

Understanding the kind of public disaffection that fuels populism should lead us to recognize the indispensability of inclusive public engagement. As Colin Hay has shown, part of the global trend of public cynicism and mistrust can be traced to a declining sense of political efficacy—to the attitude that “public officials don’t care much what people like me think.”<sup>64</sup> Hay links disengagement of this sort to the globalization and depoliticization of institutions, the effect of which has been to reduce opportunities for ordinary individuals to shape decisions affecting society.<sup>65</sup> Those of us thinking about reforms might focus on ways to democratize administrative processes by increasing the ability of citizens to offer input.<sup>66</sup> Other reforms might strengthen the expectation that agencies will demonstrate that they have listened to this input even if (and perhaps especially when) they do not always follow it.<sup>67</sup> Contributors to this symposium as well as other scholars have also suggested, of course, that modern governments would do well to look again at the ancient practice of sortition, seeking to eradicate hierarchical forms of participation, in favor of juries, panels, or deliberative polls comprising randomly selected members of the public.<sup>68</sup> In the administrative arena, some agencies are already experimenting with various kinds of public-listening sessions, citizen panels, and structured polling that operate on the model of courtroom juries.<sup>69</sup>

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<sup>61</sup> See Coglianese, “Law as Scapegoat.”

<sup>62</sup> See Morelli, Vannoni, and Bellodi, “Expelling the Experts.”

<sup>63</sup> See Walters, “The Administrative Agon.”

<sup>64</sup> Hay, *Why We Hate Politics*, 29–30.

<sup>65</sup> Hay, *Why We Hate Politics*, 156. See also Stoker, “The Rise of Political Disenchantment.”

<sup>66</sup> See Cantalupo, Cortland, and Tani, “Reclaiming Notice and Comment.”

<sup>67</sup> See Mendelson, “Should Mass Comments Count?”; Coglianese, “Managing Regulatory Institutions.”

<sup>68</sup> See, in particular, Meyler, “The Majoritarian Difficulty”; Perl, “Introduction: ‘The First Duty of Grown, Thinking People’”; Abbas and Sintomer, “Three Contemporary Imaginaries of Sortition.”

<sup>69</sup> See Sant’Ambrogio and Staszewski, “Democratizing Rule Development”; Fishkin, *When the People Speak*.

## Conclusion

The administrative state would benefit both from our accepting the inevitability of discretion and from our insistence on more participation by the public before key value choices are made. Public administration would benefit likewise from intensification of the type of antipolitics that focuses on curbing the worst forms of politics—cronyism and favoritism. The greatest danger that the administrative state faces is not that it will become embroiled in some of society’s political conflicts but that agencies will become so inattentive to the interests and preferences of broad swaths of the public, or be perceived as so irredeemably biased, that they lose the legitimacy to make decisions that inevitably support some values held by the public over others. To acknowledge the necessity of discretion and the untenability of an antipolitics that purports to eradicate it is not to deny the real discomfort that many may feel about the reality that administrative agencies make political decisions. Given the longstanding appeal of an apolitical, technocratic administrative state, some portions of the public may recoil at even recognizing the politics of administrative choice, particularly at a time of extreme political polarization in society.<sup>70</sup> When agencies make policy decisions, they inevitably disappoint, offend, or aggrieve some interest groups and individuals who would make different value judgments.

In making such judgments, agencies need to be alert to the kinds of politics that do and do not belong in administrative governance. Likewise, however, they need to be alert to the kinds of antipolitics that do and do not belong. We have tried to show here that the sort of antipolitics that disables favoritism is vital, although in highlighting its importance we are under no illusion that favoritism is ever easy to combat. Trying to manage, though, it is far better than endorsing an indiscriminately antipolitical or indiscriminately political vision of the administrative state.

Fortunately, the opposition to favoritism has a long history and has been baked into various facets of administrative law. But unfortunately, and most troublingly, those features of administrative law are now under strain. Antipolitics as directed against favoritism appears to be what is most under threat today from various charismatic forms of populism and authoritarian movements seeking to deconstruct or capture the administrative state. As a result, while the untenability of antipolitics as directed against discretion cannot be denied, society needs to continue insisting on antipolitics as directed against favoritism—calling on agencies to stay out of what should properly be regarded as the political gutter.

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