

Public Policy and Political Dysfunction

The Polycscape, Policy Maintenance, and Oversight

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In the 8 years following the enactment of the Affordable Care Act (ACA), the Republican Party in Congress called frequently and vociferously for its outright repeal. When it had passed in 2010, not a single Republican had voted in favor of it, despite its inclusion of several features that their party had promoted for years. Subsequently, in the polarized climate in Washington, Republicans found the ACA a perfect foil to distinguish themselves from Democrats. As implementation challenges mounted and health-care premiums rose, the GOP could chastise “Obamacare” and promise to repeal it as a means to rally their base, and the strategy helped the party to retake majorities in the House in 2010 and the Senate in 2014, and to win the White House in 2016. But no sooner had Republicans achieved unified government than it became evident that even in the House of Representatives, the party would have significant trouble corraling enough support to pass a repeal-and-replace bill (named, in acronymous likeness, the American Health Care Act). After the first failed attempt at passage in March 2017, Speaker Paul Ryan successfully forced the bill through the House 2 months later, only to have the Senate reject its passage in a dramatic late-night session in July. What explains the Republicans’ failure to legislatively follow through on one of their key electoral promises?

The answer, in brief, is that over the 7 years of its existence, the new policy had taken on a life of its own and transformed politics in the process, and now it was impossible to simply eviscerate it. Though seemingly beleaguered, the ACA had restructured institutional and organizational arrangements for health-care delivery. Insurance companies and hospitals responded by altering their standard operating procedures, and they wanted neither to be forced to change them back again nor to face new uncertainties about health-care provision. Governors and state legislators who had welcomed the ACA’s Medicaid expansion and the accompanying federal funds, including some Republicans, did not want to face disgruntled constituents or lose the resources

on which their states relied. (As of June 2018, 33 states plus the District of Columbia have accepted federal funds to expand this program.) Among ordinary citizens, momentum shifted from proponents of repeal to those who either favored the law or disliked aspects of it but wanted to see it improved, a group that included many Republicans (Jacobs and Mettler, 2017). On the eve of the first scheduled House vote, reports came out that as few as 17 percent of Americans supported it (Firozi, 2017). With support for the bill fracturing his own caucus, Ryan withdrew it, announcing that “Obamacare is the law of the land” and that it would remain so “for the foreseeable future” (Conway, 2017). Despite Ryan’s later success in passing a revised bill, lack of enthusiastic support across the party ultimately presaged its Senate death, and even a subsequent vote in that chamber on the “skinny bill” failed to garner enough support when three GOP members crossed party lines to defeat it. “It’s time to move on,” said a weary Speaker Mitch McConnell. Since then, despite the Trump administration’s efforts to construct roadblocks to ACA implementation, the law prevails, with enrollments fairly steady and market-places intact.

The case of the ACA illustrates a fundamental truth about contemporary American politics: public policy itself now functions as a formidable part of the political landscape, shaping politics at both the mass and elite level and influencing future policy changes. We dwell today in what could be called a “policy-scape,” a political environment that is densely laden with policies such as these that were created in the past, particularly in the robust policymaking period of the 1930s through the 1970s that now structure the political order. On net, federal spending accounts for 1 in 5 dollars in the nation’s economy, with an increase from 3.6 percent of GDP in 1930 to 20.5 in 2015 (Federal Reserve Bank of St. Louis, 2016). Besides allocating dollars, policies structure public and private life through a vast array of regulations. They connect the federal government with states and localities in a web of intergovernmental relations, through a variety of mechanisms that range from promotional to coercive. Policies include not only direct, visible forms delivered directly by government, but also numerous others channeled through the tax code or nonprofit and private organizations.

In order to understand contemporary American politics, public policies cannot be regarded simply as outcomes of the political process; rather, they have taken on the role of institutions, fixtures of the political landscape that are themselves highly consequential. “New policies,” as E.E. Schattschneider observed long ago, “create a new politics” (1935, p. 288). Policies organize the terms of political conflict, both by creating standing commitments of the political parties and by energizing political activists, and these dynamics in turn have fostered polarization. Policies convey messages about the appropriate scope of government action and imbue citizens with a sense of their *status*, with implications for their civic engagement. Policies also influence interest groups’ goals and, in some instances, even spur their creation.

By their very existence, public policies transform the character of politics and the realities of political opportunities and constraints. In contemporary American political development, the number and scope of policies have grown to a point that has intensified these tendencies. In addition, accumulated policies today exist in a polity of transformed political and institutional conditions, such as the rise of partisan polarization, and they may both affect and be affected by those circumstances. In this chapter, we will begin with an overview of the polycscape, and then we will probe four aspects of its impact. First, existing policies affect the possibilities for the creation of new public policies or policy reform and the shape that such developments take, foreclosing some and channeling others. Second, the thickening and multiplication of policies appears to interact with other contemporary institutional and political developments in ways that exacerbate gridlock and dysfunction. Third, policies require routine maintenance if they are to continue to function as lawmakers planned, rather than to deteriorate, become derailed, or grow outdated as circumstances change. Congress can engage in such action through reauthorization or other policy adjustments, but the accumulation of such responsibilities in tandem with other political developments appears to hinder these routines from occurring as regularly as in the past. Fourth, long-established policies also require regular monitoring through the oversight process, but Congress's capacity to fulfill such responsibilities varies over time as the institutional and political context changes, and it has been subject to deterioration over the past quarter-century. In sum, the investigation of how policies themselves influence and are affected by contemporary politics opens a vast and important area of inquiry that scholars have only begun to explore.

POLICIES AS INSTITUTIONS THAT SHAPE POLITICS: AN OVERVIEW

Although existing public policies have emerged as formidable institutions in their own right for at least half a century, not just in the United States but also in other affluent nations, scholars are still in the early stages of the investigation of the difference this development makes for contemporary politics. Political scientists have traditionally regarded public policies as a “dependent variable,” an outcome of the political process, and focused on explaining the political circumstances under which lawmakers have succeeded or failed in creating them (Pierson, 1993). A growing number of scholars, however, have been directing attention to the accumulation of policies and how their collective density is reshaping the nature of politics itself (Fukuyama, 2014, Hacker and Pierson, 2014, Orren and Skowronek, 2014, Pierson, 2014, Jenkins and Milkis, 2015).

Certainly the presence of policies that were created in the past is nothing new, and newly elected public officials have never encountered a *tabula rasa*;

nonetheless, the proliferation of policies since the mid-twentieth century – their sheer number and complexity – has led to qualitatively different political dynamics than those of earlier times. Stephen Skowronek uses the term “the policy state” to describe the contemporary political order, one in which “problems of American political development present themselves as problems of public policy and policy choice” (2009, pp. 334–335). Richard Rose and Philip L. Davies wrote that policymakers are “heirs before they are choosers,” as they “spend far more time living with the consequences of inherited commitments than with making choices that reflect their own initiatives” (Rose and Davies, 1994, pp. 1, 4–5). In Paul Pierson’s book examining why both the Reagan and Thatcher administrations failed in many respects to achieve welfare state retrenchment, he observed that “policies inherited from the past” condition politics by facilitating the development of constituencies that defend those policies and by affecting the political strategies available to reformers and their opponents (Pierson, 1994, p. 9). More recently, Pierson and Jacob Hacker have referred to “policy as terrain,” demonstrating that control over policy has become the “prize” over which political actors struggle in the electoral arena (Hacker and Pierson, 2014, p. 645). Stephen Teles refers to the modern American state as a “kludgeocracy,” less distinctive for its size than for the complexity of public policy, which has developed in an incoherent manner that makes the system prone to failure (2013).

Precisely how policies shape politics is a matter that increasingly interests scholars but that is still early in its theoretical development and empirical examination. Theda Skocpol was one of the first scholars to coin the term “policy feedback,” meaning that “policy, once enacted, restructures subsequent political processes” (Skocpol, 1992, p. 58). Pierson built on these ideas, suggesting that resources and interpretive mechanisms might be at play, influencing the demands and participation of interest groups and mass publics alike (Pierson, 1993, also see Schneider and Ingram, 1997). Several scholars have examined these dynamics empirically, particularly in the case of individuals (e.g., Campbell, 2003, Lerman and Weaver, 2014, Mettler, 2018).

Some suggest that policies, once established and plentiful, foster inertia in the political system, making the status quo or steady expansion of policies inevitable. Frances Fukuyama (2014) sees the contemporary welfare state as complicated and difficult to reform. Paul Pierson’s early work (1994) indicated that policy feedback tends toward “lock-in” – positive, self-reinforcing dynamics. Other studies also reveal dynamics emanating from policies in which stability and entrenchment dominate (e.g., Rose and Davies, 1994, Ejdemyr, Nall, and O’Keefe, 2015, Nall, 2015).

Yet policies do not necessarily exhibit durability. Kathleen Thelen and Wolfgang Streeck (2005) have argued that political institutions generally may confront “incremental process of change” that in time transform their character and effects, and public policies are no exception. Sometimes policies vary in their sustainability owing to the different political and institutional

circumstances in which they were enacted or in which implementation began (Berry, Burden, and Howell, 2012, Maltzman and Shipan, 2012). In addition, as Eric Patashnik argues, longer-term sustainability may be affected by whether or not policies engender supportive administrative and legal structures (2008). Hacker (2004) has shown that, over time, policies are subject to “drift,” which occurs when Congress fails to “update” current laws in accordance with evolving political, social, and economic conditions, leading to a fundamental incongruity between socioeconomic problems and policy solutions (Hacker and Pierson, 2001, McCarty, Poole, and Rosenthal, 2006). In short, policies may cease functioning as they once did because *external* circumstances change, and lawmakers fail to make necessary adjustments so that policies can keep pace. The failure to raise the gas tax for the highway trust fund as environmental circumstances change is a case in point, and it makes both maintenance of the infrastructure and new innovations much more difficult to accomplish.

In addition, policies can deviate from their intended purposes over time due to *internal* changes. *Policy design effects* may become manifest later on, for example, as particular features evolve to foster deterioration. Policies that lack automatic cost-of-living adjustments and that fail to rise automatically with inflation, such as the minimum wage and Pell grants, necessarily wither in value unless lawmakers take action to elevate rates, whereas those with such features, such as Social Security and tax expenditures, are protected. *Unintended consequences* occur when policies inadvertently provide incentives to individuals or organizations to act differently than they otherwise would, leading vested interests to emerge and engage in rent-seeking, thus derailing policy from its intended purposes. For example, the availability of federal student aid promoted the development of a for-profit sector of colleges and training institutes, which depended almost entirely on government funds, enriching shareholders but leaving students indebted and poorly trained, at taxpayer expense. *Lateral effects* occur when the development of an unrelated policy shapes a policy’s own development, for example by squeezing resources or limiting the eligibility pool. Growing demands on state budgets for mandatory spending on Medicaid, K–12 education, and incarceration has led to reduced commitments to public higher education, the largest discretionary item in most state budgets (Mettler, 2014). Aaron Wildavsky long ago anticipated such dynamics, observing that over time “policy becomes more and more its own cause,” as policies develop in ways that affect one another’s growth (1979, p. 81).

We will argue that in the contemporary polity, the policyscape generates a vast and complex array of developmental dynamics, encompassing both those that perpetuate the status quo and “lock-in” as well as those that lead to deterioration of existing policies. The policyscape’s emergence means that the task of public officials is different today than in the past; if government is to function well, they need to be knowledgeable about and committed to policy maintenance and oversight. As we will see, however, other forms of institutional decay undermine such capacities and the political incentives to pursue them.

HOW POLICIES INFLUENCE NEW POLICY DEVELOPMENT

Policies created in the past shape the prospects for new policy development, as well as the form such policies take, through multiple dynamics. Consider the centrality of concerns about taxing and spending in US politics today, as Americans appear to want government to address myriad social and economic problems but oppose tax increases to pay for new policies. This conundrum is often cast as solely a feud between liberals and conservatives and between the nation's major political parties, but closer examination reveals plenty of support for spending priorities on both sides of the aisle (Page and Jacobs, 2009). Already, existing policies themselves play a major role in locking-in both spending commitments and reduced tax obligations, and these in combination constrain lawmakers' capacity for policy innovation.

While the federal budget is vast, amounting to \$4 trillion in spending in 2017, in fact it contains remarkably little leeway to permit resource allocations for new policies. In part this is because in the most recent calendar year, spending has surpassed revenues, as it has each year since 2001 (CBO, 2017a). Deficit spending is nothing new; the federal government has operated with deficits for most years in the post-World War II era, with the surpluses in several consecutive years during the late 1990s as the exception (CBO, 2015b). Two-thirds of federal spending, however (\$2.5 trillion in 2017), is allocated to mandatory spending programs for which eligibility is determined by law and is nonnegotiable; the lion's share goes to Social Security, Medicare, and Medicaid, and a small portion to other income support programs. In addition, \$263 billion went to pay interest on the debt. This leaves \$1.2 trillion for discretionary spending, half of which is allocated to defense. Just 15.25 percent of the budget remains for discretionary domestic programs (CBO, 2017a, 2017b), and most of it is dedicated to well-established commitments in a wide array of areas including health-care and health research, transportation and economic development, education for K-12 and college students, vocational training, food and nutrition, housing assistance, science, energy and environmental programs, law enforcement, and diplomacy. Among the programs included in these categories are venerable entities such as Pell grants and WIC (Special Supplemental Nutrition Program for Women, Infants and Children), the Centers for Disease Control and Prevention (CDC), the national park system, and numerous others (CBO, 2015a, Center on Budget and Policy Priorities, 2016). It is also the case that congressional advocates of deficit reduction triumphed in recent years, forcing "sequestration" rules that limited spending across issue areas and further stymied maintenance of the polycscape. As a result of such constraints, new policies cannot be considered without engaging in difficult trade-offs, with cuts made to existing programs to permit new innovations.

Theoretically, the nation could opt to increase revenues by altering the tax code in ways that raise rates and rein in exemptions and loopholes. Despite vast fiscal challenges and rising economic inequality, this alternative has not gained

favor. The problem is not only the absence of political will, but also the status of tax policy itself. Republican lawmakers since the Reagan era have repeatedly pursued aggressive tax cuts, further reducing revenues. With spending commitments largely locked in and tax revenues reduced, policymakers have been engaged in a war of attrition, with little capacity to pursue new ideas that cost money.

In 2001 and 2003, President George W. Bush and Congress agreed on large tax cuts, with benefits that would be bestowed particularly on the affluent, and would take effect gradually over the next decade (Hacker and Pierson, 2005a). As it happened, their largest impact in reducing federal revenues coincided with the years following the 2008 financial downturn, when the state of the economy already ensured a smaller inflow of resources. The long-run consequences of the Bush tax cuts therefore foreclosed opportunities for a larger economic stimulus during the Obama administration, one that might have promoted a stronger recovery, reached more Americans who are currently frustrated by long-term stagnation in incomes, and permitted other new spending commitments. Democratic lawmakers in 2010 did agree to raise revenues from the wealthiest taxpayers as a means to pay for provisions of the Affordable Care Act.¹

In 2017, Republican majorities in Congress achieved their major goal in enacting the Tax Cuts and Jobs Act, which was signed into law by President Donald Trump. The primary aim of the legislation involved tax cuts, rather than reform: it reduced household tax rates, with those of the affluent trimmed by the greatest percentage, and it slashed the corporate income tax rate from 35 percent to 21 percent. Unlike the revenue-neutral approach adopted in the bipartisan effort to enact tax reform in 1986, the TCJA is projected to increase the deficit by amounts ranging from \$1.6 trillion to \$1.8 trillion, according to analyses from the Joint Committee on Taxation, Penn Wharton School, and Tax Foundation (Patel and Parlapiano, 2017). The TCJA tops even the Bush tax cuts of 2001 and 2003 in upwardly redistributive effects: Hacker and Pierson estimate that the new tax law provides approximately 60 percent of its benefits over 10 years to the top 1 percent (2005b).

The one major avenue that lawmakers have found for bypassing the taxing and spending conundrum, at least at the moment of policy enactment, is by spending through the tax code itself: offering new or expanded benefits in the form of tax expenditures – otherwise known as tax breaks – rather than direct spending in the form of income support for households or payment of services.

¹ In 2012, President Barack Obama reached a compromise with Congress to permit a small portion of the Bush tax cuts to expire, effectively raising taxes on high-income households (for married couples earning \$450,000 or above). The deal also increased the tax on capital gains and dividends from 15 to 23.8 percent, though kept it well below the rate of 28 percent, which prevailed in the late 1980s and early 1990s (Burman and Slemrod, 2013, CBO, 2014, p. 8). Other major features of the Bush tax cuts, including other across-the-board rate cuts and estate tax exemptions, remained in place.

In doing so, they are building on a long, well-established component of US policy – what Christopher Howard has termed the “hidden welfare state,” which includes part of what Jacob Hacker has called “the divided welfare state,” and what one of us has termed “the submerged state.” The largest tax expenditures are a triumvirate of policies, including the home mortgage interest deduction, established in 1913; the nontaxable status of employer-provided retirement benefits, in 1926; and the nontaxable status of employer-provided health benefits, in 1954 (Howard, 1997, p. 176). Given rising demands for government responsiveness to multiple issues but escalating antipathy to new taxes, lawmakers increasingly turned to tax credits and tax deductions, and their number grew from 81 in 1980 to 151 in 2010 (Mettler, 2011, p. 20). Tax expenditures became, as one lawmaker put it, “the only game in town”: the sole approach that could garner bipartisan support for new policies across a range of purposes, from social welfare to college savings, job creation to energy conservation, and numerous others (Howard, 2002, p. 428). The 2017 tax cuts did scale back the scope of a few tax expenditures, such as the state and local tax deduction and mortgage interest deduction, but left most intact.

But while the “submerged state” strategy offers short-term gains in appealing to voters, in numerous ways such policies compound the difficulties lawmakers confront in creating constructive policy solutions to perceived problems. Tax expenditures worsen the nation’s long-run problem of insufficient revenues by reducing the amount government collects. They easily become entrenched, furthermore, because once part of the tax code, they remain in place, not being subject to the annual appropriations process as are most direct spending programs. Many of them cultivate defenders in industries that benefit from their existence, such as realtors, homebuilders, and insurance companies, and the interest groups that defend them assiduously from reductions. Notwithstanding a few exceptions such as the Earned Income Tax Credit, tax expenditures overall benefit primarily the wealthiest Americans: the Congressional Budget Office (CBO) estimated that in 2013, 51 percent of the benefits in the 10 largest such policies accrued to households in the top fifth of the income distribution, with the top 1 percent alone netting 17 percent (CBO, 2014). As a result, these policies fail to mitigate inequality and reduce the source of revenues that could be applied to policies that do more to aid low- and middle-income people (Mettler, 2011). Ordinary citizens who utilize such policies, in contrast to those who use policies delivered directly by government, fail to gain an enhanced awareness that government has helped them or provided them with opportunities to improve their standard of living (Mettler, 2018). This in turn makes it all the more difficult to muster the political will necessary for grand bargains and tough compromises necessary for governing.

As a result of such dynamics, these policy designs immensely complicate opportunities for reform, and influence the form that they take. Take health care, for example. The United States long remained an outlier compared with

other affluent nations because of its failure to extend health coverage to working age adults. Presidents from the time of Harry Truman aspired to achieve this goal, and faced charges of introducing socialism (Blumenthal and Morone, 2009). After President Dwight Eisenhower signed into law the provision noted above, excluding from taxation the amounts employers put aside for their employees' health coverage, more and more Americans benefited from these tax subsidies, but from all appearances, it was the private sector that actually provided the benefits. Insurance and pharmaceutical companies evolved into third-party beneficiaries of these arrangements. President Lyndon Johnson worked around this existing system by promoting and signing into law Medicare and Medicaid, for seniors and low-income people. As Hacker has noted (2002), this combination of arrangements increasingly made Americans think of health coverage for workers as the domain of the private sector, free of public interference, hindering the prospects for reform. When President Bill Clinton tried to promote health reform, insurance companies ran ads aimed to frighten Americans about a government takeover, and opposition quickly mounted among the public and in Congress. Clinton's reform plan was never even formally considered in Congress.

By the time President Barack Obama took office, he could glean lessons from 60 years of developments and failures. The ACA built on top of already existing programs and approaches. The new law extended health coverage to many people, for example, through an expanded version of Medicaid. Also, to the chagrin of Obama's supporters who had expected him to circumvent interest groups, he cut deals with groups that were already advantaged through existing policies so that they would support reform. As Lawrence Jacobs and Theda Skocpol have observed, the ACA came to fruition because public officials were willing to negotiate with major stakeholders such as insurance companies and drug companies (2010). Opponents depicted the ACA as a "government takeover," and yet the law's health insurance marketplaces (or "exchanges") are expected to bring 29 million customers to insurance companies by 2019, with a mandatory obligation and government subsidies to encourage sign-ups. By building on the existing system and negotiating with key players, Obama succeeded where Clinton and others had failed. Proponents of a single-payer system, vocal during the 2016 Democratic presidential primary, fail to acknowledge the inherent challenges in such a transformation in the United States, as it would require smashing an existing system that is deeply entrenched. Now, the political and organizational dynamics spurred by the ACA have enabled it to survive despite the calls for its repeal; future health reformers will need to work within its structure to improve health-care coverage, delivery, and costs.

In sum, when public officials seek to address issues today, they do not start on a policy frontier. Rather, they confront a dense polycscape, and must typically build atop or circumvent existing policies that already generate all sorts of effects that complicate reform and channel the path that it takes.

THE POLICYSCAPE AND OTHER POLITICAL INSTITUTIONS

Since the mid-1990s, American political institutions appear to be lapsing into greater dysfunctionality, none more than the US Congress. As numerous scholars have observed, gridlock appears to be on the rise. Gridlock refers to the inability of Congress to pass the legislation necessary for either updating and maintaining current laws or passing new ones to regulate modern life. However we measure it, whether as the number of important bills passed in a given Congress (Mayhew, 2005), the proportion of all salient items on the legislative agenda that a given Congress manages to pass (Binder, 2000, 2003) or the number of enacted bills that change, revise or restructure extant policy (Saeki, 2009), stalemate in the legislature presents unique and in many cases unprecedented challenges to the American polity in its third century. Gridlock has led to a decrease in public esteem for and trust in Congress as an institution (Binder, 2000, 2003) and to long-standing vacancies in executive agencies and federal courts, compromising those institutions' ability to perform their own constitutional roles (Binder and Maltzman, 2002, Teter, 2013, Mann and Ornstein, 2016).

The challenges presented by the polycscape may themselves be affected by deteriorating capacity of political institutions to perform routine tasks, and in turn it may be exacerbating those developments. Certainly Congress, the nation's primary policymaking body, has risen to confront far greater challenges in American history than policy accumulation, from war to the Great Depression. And as recently as the administration of President George H.W. Bush, Congress managed to enact numerous new laws and update existing laws effectively. Yet today the paired emergence of partisan polarization and the polycscape, both in the context of the traditional Madisonian system, seems to present growing challenges to governance.

The American political system is characterized by institutional arrangements that deter hasty or capricious decision making and action. The US Constitution deliberately poses numerous obstacles to policymaking, requiring a high degree of compromise and negotiation for it to succeed (Robertson, 2005, Chapter 8). Separation of powers means that the executive and legislative branches lack the degree of coordination inherent in parliamentary systems. Congress itself, consisting of two distinct chambers, each selected through different electoral procedures by different constituencies, heightens the challenges of enacting laws. Compounding the difficulties further, the Senate is structured in a manner that gives extra weight to low-population states, and it operates according to rules that empower the minority and individual members, presenting numerous roadblocks to collective action. In short, US institutions contain numerous "veto points," making change difficult (Fukuyama, 2014, p. 503).

While these institutional arrangements have prevailed throughout the nation's history, the rise of the polycscape may cause them to operate with even greater difficulty than is the norm. In a political system designed to make

decision making multistaged, cumbersome, and impossible without widespread agreement and coordination, the accumulation of policy density and complexity may slow or deter action. The thickening of public policies may also stymie Congress's ability to maintain and oversee them effectively, as we will discuss in subsequent sections of this chapter.

The governing challenges of the polycscape have also emerged in tandem with the declining capacity of the political parties to function effectively. Early on in US history, lawmakers created political parties precisely in order to overcome the difficulties of institutional design. These organizations aim to coordinate public officials, enabling them to work together across chambers, branches, and time in order to achieve policy goals. At their best, the parties "grease the wheels" of the complicated machinery of US government, but in recent decades, they have more often clogged it, leading to gridlock, particularly in Congress. Some interpret this as the effect of rising ideological polarization, owing to the disappearance of political moderates and the rise of greater homogeneity within the two major parties in addition to a growing gulf between them (McCarty, Rosenthal, and Poole, 2006). Frances Lee attributes the rise of partisanship in Congress to the sharply increased competition between the parties, since 1980, in their struggle to control both chambers. The parties' chief political strategy – aimed at gaining an electoral advantage – has been to distinguish themselves from one another, and to adopt a strident "teamship" even on nonideological votes as a means of conveying these distinctions to voters. This "perpetual campaign" approach to governing deprives lawmakers of the time needed to focus on policy matters and it imperils the requisite capacity to compromise and negotiate (Lee, 2016, pp. 48–60).

These transformations in Congress undercut policymakers' engagement in lawmaking and policy maintenance, just at the point in time when the emergence of the polycscape most requires it. The institution's capacity for information gathering, which is necessary to deal with complex issues, vacillates over time (Baumgartner and Jones, 2015). It has diminished recently, in part because of a reduction in the time allotted to hearings, which are held less often, are shorter, are more often one-sided, and are less oriented around problem-solving than in the past (Mann and Orenstein, 2006, p. 215, Lewallen, Theriault, and Jones, 2015, pp. 22–23). The rising cost of competitive campaigns puts pressure on officials to devote more time to fundraising, at the expense of intensive policy work. Lee also points out that party leaders have moved resources away from committee staff and toward public relations personnel in their own offices, in order to communicate the party brand to voters (2016, Chapter 5, also Drutman and Teles, 2015). Numerous long-serving members as well as staffers who were renowned for their policy expertise have retired or, in the case of some members, lost their seats. For all of these reasons, rising partisanship appears to deprive Congress of the capacity necessary to manage effectively the large array of complex policies that exist today.

It is also possible, furthermore, that the emergence of the policyscape itself has in part contributed to the rise of more ardent partisanship. Party leaders draw on differences in stances on policy issues to distinguish their party from the opposition, and activists also accentuate these distinctions. The growth of social welfare spending as a percentage of personal income may have reached a tipping point that heightens the liberal and conservative divide. The impact of policy accumulation on partisanship is a topic yet to be examined directly by scholars. What can be said, however, is that polarization or teamism, together with the emergence of the dense, complex array of existing policies in the United States, combine to make navigating the nation's multiple institutional veto points increasingly difficult. Now we will examine how this mix influences policy maintenance and oversight.

POLICY MAINTENANCE

The large number of existing policies means that the “old business” section of the congressional agenda brims over with updating and maintenance tasks, according to E. Scott Adler and John Wilkerson (2012). Thad Hall explains that the 1946 Legislative Reorganization Act required some laws to be reauthorized, and by the 1960s, Congress attached sunset provisions to nearly all complex new domestic policies, as a means to reassert congressional authority over the executive branch (2004, pp. 17–19, 25). Adler and Wilkerson, using data from 1980 to 1998, find that Congress continued to reauthorize legislation even after other forms of dysfunctionality began to emerge, but Hall and James Cox detect that such policy maintenance itself began to wane by late in the 1990s (Cox, 2004, pp. 57–58, Hall, 2004, pp. 104–105).

As a cursory means to examine policy maintenance up to the present, we consulted the 20 policy areas identified by Americans in 2015 as top issue priorities, and then created an inventory of 34 policies that pertain to those priorities. Some of these policies require reauthorization, while others do not, but Congress has typically engaged in regular reform even of the latter types. The next step was to investigate how recently the law had been reauthorized or updated, and whether it was either formally overdue for such maintenance or informally so (in the case of laws that lack sunset measures but were updated more often in the past). This approach contains limitations, of course, as some might suggest additional policies that apply to each category, or point out that some categories do not refer to obvious federal legislation (e.g., “moral breakdown”), and so forth.

Overall, this assessment indicated that more than half of the policies were either overdue for reauthorization, or “out of date” in the case of those lacking sunset provisions but for which reforms had not occurred for a period longer than the number of years in between past reforms. Policies overdue for reauthorization include Head Start, the Higher Education Act, the Individuals with Disabilities Education Act, the Juvenile Justice and Delinquency

Prevention Act, Temporary Assistance to Needy Families, and Unemployment Insurance, each of which falls into an issue category that more than half of Americans consider a priority. Although 51 percent of Americans name the environment as a top priority, several key policies have languished now for 25 to 30 years, including the Clean Air Act Amendments, the Clean Water Act, and the Superfund. Policies that appear to be outdated include immigration, which previously permitted bipartisan grand bargains but is increasingly subject to partisan divides, particularly exhibited by the parties' failure to reach a legislative agreement on the Deferred Action for Childhood Arrivals (DACA) program that began as an Obama executive order and was overturned by President Trump; the Voting Rights Act, of which Section IV was invalidated by the Supreme Court in the 2013 decision *Shelby County v. Holder*; and policies governing lobbying and money in politics, among others (Mettler, 2016, pp. 380–382).

Inattention to policy has real consequences, illustrated, for example, by the deteriorating record of the nation's aid policies for college students. In the mid-twentieth century, the United States led the world in college graduation rates among young adults, but since then 10 other countries have surpassed it, and improvements among those who grow up in households below the median income have barely increased (Mettler, 2014, pp. 21–26). The United States also played a pioneering role in developing environmental policies up until the 1990s, but since then, as David Vogel has shown, it has lagged behind while European countries have leapfrogged beyond it (2012). Gridlock combined with policy complexity hinders not only the development of new policies but also the updating of existing ones.

Of course, policy neglect may be preferable to making changes if those alterations are hostile to a policy's intended aims or for other reasons leave it weakened or eviscerated. In 2017, for example, the Republican-led House of Representatives passed a reauthorization of the Higher Education Act that, if signed into law, would eviscerate regulations on for-profit colleges. The status quo, problems aside, may at least keep in place a modicum of policy functionality for public services that Americans rely on. As the Trump Administration is learning, policies, particularly those enacted as laws, offer a form of stability to American government and, unlike executive orders, once in place they are not easily dismantled.

OVERSIGHT

Policy maintenance depends almost as critically on Congress's second major, implicit constitutional responsibility: *oversight* of the presidency and of the administrative state. "Oversight" is a catch-all term that refers to Congress's dual ability to conduct retroactive investigations of executive branch activities as well as to consistently review administrative agency activities and implementation of programs (Pearson, 1975, see also Kaiser, 1988). Scholars have

distinguished between the “more routine, accommodative” proactive surveillance of administrative agencies and the “adversarial, often confrontational, and sometimes high-profile nature of congressional investigations,” but the vast number of activities that could conceivably huddle under the “executive oversight” umbrella makes the responsibility difficult to parsimoniously define and measure. Congressional oversight of the executive may include regular “nonlegislative”² hearings convened by budget, appropriations, and authorizing committees; informal meetings between legislative staff and executive officials; investigations of complaints from constituents and interest groups by individual members or committees; brokering communication and negotiations between constituents and government agencies (constituent casework); agency audits and reviews by the Government Accountability Office (GAO)³ upon request by a member of Congress; statutory controls over administrative procedures; and constitutional responsibilities such as the ability to “advise and consent” on presidential nominees (in the Senate), to impeach and try the president for “high crimes and misdemeanors,” and to reorganize executive agencies, among other institutional duties. Perhaps most importantly, Congress may continually request and gather information from the executive on how previous laws have been implemented in order to seriously consider whether a proposed piece of legislation will fit into the policy environment that already exists, as well as what kind of future choices the legislation might constrain. Woodrow Wilson, in his seminal 1885 study *Congressional Government*, argues: “Quite as important as legislation is vigilant oversight of administration, and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in the broad daylight of discussion.” In its idealized form, then, we might even consider oversight to be a continuous public *conversation* between Congress and the executive over what has worked, what does work and what will work for achieving not only efficient and effective public administration but also broad legislative goals.

Congress’s ability to monitor the executive branch is established, albeit indirectly, by the Constitution, both in the document’s separated-institutions-sharing powers framework (to use Neustadt’s famous term) as well as in the enumerated powers granted to Congress. Congress could not possibly exercise its Article I powers – such as appropriating funds from the US Treasury, declaring war, and organizing executive departments – without constant vigilance over executive branch activities, and the “necessary and proper” clause in

² “Nonlegislative” hearings refers to hearings where no specific piece of pending legislation is considered (see Baumgartner and Jones, 2015).

³ The GAO (formerly the General Accounting Office) is an independent and nonpartisan government agency that provides auditing, evaluation and investigation of the executive branch for Congress; the GAO is frequently referred to as “Congress’s watchdog” and is perhaps best described as the auditor of the American state.

Article I, Section 8 legitimizes secondary activities, such as oversight, that will help Congress achieve its primary legislative goals (Kaiser, 1988, Sunstein, 1993, Talbert, Jones, and Baumgartner, 1995). The oversight powers implicit in the Constitution were affirmed by the Washington Administration during the Second Congress (1791–1793), after the House of Representatives fiercely debated and ultimately passed a resolution to establish a committee to investigate War Department unpreparedness after the defeat of American troops at the hands of Native American tribes. President Washington determined that the House indeed had the right to investigate the executive branch, despite the Constitution's lack of *direct* guidance on this question, and agreed to provide any information the House committee requested that did not jeopardize national security (thus also setting the precedent for “executive privilege,” which Washington did not need to invoke in this instance since none of the requested materials violated his national-security standard). Washington's decision “firmly established Congress's power to investigate the conduct of executive branch actors, and served as an important precedent for numerous congressional investigations throughout the nineteenth century” (Kriner and Schickler, 2014, p. 19).

In the twentieth century, the Supreme Court cemented Congress's right to compel information from the executive as well as to regularly review administrative activities, with some restrictions. In *McGrain v. Daugherty* (1927), the Supreme Court upheld Congress's right to investigate the Attorney General and the Justice Department for failing to prosecute administration officials who accepted bribes from oil companies in exchange for leases to extract petroleum on federal lands (the so-called Teapot Dome scandal). The Supreme Court again decided in favor of congressional oversight 2 years later in *Sinclair v. United States* (1929), mandating that Congress could legally hold in contempt any citizen who refused to provide information critical to an investigation. In *Watkins v. United States* (1957), while the Court established clear limits on the type of information Congress could legally compel private citizens to disclose, Chief Justice Earl Warren emphatically upheld Congress's investigative rights more broadly. Warren maintained in his majority opinion that “the power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” Warren noted, however – in a comment that would provide considerable dramatic irony for future scholars studying the electoral benefits of position taking during hearings – that “investigations conducted solely for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible” (354 U.S. 178, 187). Later, in *US v. Nixon* (1974), the Court reaffirmed the right of Congress and special prosecutors to compel information essential to an ongoing investigation from the executive branch, significantly qualifying the president's “executive privilege” and empowering Congress.

Congress has also strengthened its executive authority through statute: the Administrative Procedures Act of 1946 was the first piece of legislation that established uniform standards for agency decision making; its progeny, the Freedom of Information Act of 1966, imposed strict disclosure requirements for executive agencies. The Legislative Reorganization Acts of 1946 and 1970 vastly expanded Congress's capacity to conduct investigations of the executive and, crucially, the 1970 Act expanded the GAO's right to conduct regular evaluations of executive programs in addition to financial audits of government agencies. More recently, as a result of the Clinton administration's "Reinventing Government" initiative, Congress enacted two critical statutes⁴ that enhanced the accountability of government agencies by requiring all agencies to submit strategic and performance goals, and later all proposed rules and regulations, to Congress and the GAO before approval (Oleszek, 2010).

Congress has steadily increased its own capacity for oversight in order to establish the accountability of a rapidly growing administrative state both to the American people (through their elected representatives) and to Congress itself: persistent and consistent "watchfulness" over government agencies upholds the integrity of the principal-agent relationship between Congress, which authorizes policies and programs, and the agencies tasked with implementing them. Congruity between lawmakers' intent and actual policy outcomes (post-implementation) is especially difficult in light of the fact that agencies have to answer to multiple principals – various authorizing and appropriations committees, the full House and Senate chambers, the Office of Management and Budget (OMB), the GAO, and special interests both within and outside the federal government (see Moe, 1987). Thus, rigorous, sustained oversight is one of Congress's most important weapons for ensuring that agencies conform as closely as possible to lawmakers' preferences.⁵

That Congress *should* conduct rigorous oversight is uncontroversial among American political actors and in the academic literature; whether Congress regularly and effectively fulfills this responsibility is another matter. It's tempting to point to an apparent "golden age" of oversight from the late 1960s to late 1980s that reached high-water marks with congressional investigations of Vietnam war policy under Johnson and Nixon, the Watergate hearings, and the investigations of the Reagan administration's covert weapons sales to Iran in order to aid anti-Communist rebels in Nicaragua. Aberbach (1991) shows that, beginning in the early 1970s and continuing through the

⁴ The Government Performance and Results Act of 1993 (GPRA) and the Congressional Review Act of 1996 (CRA).

⁵ However, it's worth noting that oversight from multiple committees can sometimes make the process less effective; a fragmentation of information, activities, and preferences among several committees may lead to little or no information-sharing and an inability of the agency in question to respond effectively to its principals (see Lewis, 2008).

1980s, Congress significantly increased its oversight activities in response to the continued growth of the administrative state and to public dissatisfaction with government in general – but that, crucially, this period of enhanced oversight occurred “in an advocacy context . . . in an environment of support for the basic goals of [the relevant] programs and agencies” (Aberbach, 2002, p. 61). In other words, Congress presented itself as less of an enemy and more of an ally to the administrative state. Whittington (2001) argues that, during the Nixon administration, Congress effectively constructed a new standard for oversight, pushing back against the perception – in both the White House and, increasingly, among the public – that the president should have ultimate discretion over foreign policy, a norm that remains intact today despite significant increases in executive power after the 9/11 terrorist attacks and the subsequent “War on Terror.” Furthermore, congressional investigations of Nixon’s abuses raised the level of discourse and diligence within Congress itself; Congress felt obliged to meet the same standards of conduct it imposed upon the executive (Whittington, 2001).

McCubbins and Schwartz (1984), focusing on the same political era, argue that what appears to be lax Congressional oversight is in fact a reflection of Congress’s preference for a particular *type* of oversight: rather than expend resources on *ex ante* surveillance of agency activities (so-called police patrol oversight), Congress opts instead for “fire alarm oversight,” a process through which Congress statutorily establishes a system of rules and procedures that permit constituents, interest groups, and other whistleblowers to sound “fire alarms” about administrative malfeasance. Congress will then respond to the charges through investigations. Far from neglecting its oversight duties, the authors argue, Congress has instead made a rational decision to delegate its administrative surveillance responsibilities to outside groups, who are better positioned to provide specific information about agency misdeeds, thus saving members time and resources that are all too precious in the federal legislature.

However, other assessments have not been nearly as optimistic. Writing *during* the supposed golden age of oversight, some scholars bemoaned Congress’s inability to rigorously and vigilantly monitor the executive, calling the legislature’s efforts “weak and ineffective” (Pearson, 1975, p. 281, see also Scher, 1963, Fiorina, 1981, Ogul, 2009). And more recent studies have affirmed past charges of Congress’s being asleep at the wheel. Mann and Ornstein (2006) underscore Congress’s abdication of its oversight responsibilities particularly since the beginning of the new century:

During the 1980s and into the 1990s . . . Serious oversight was done by the Appropriations Committees in both houses and by a number of authorizing committees. When the Republicans took control of Congress, there was substantial aggressive oversight – for the period when Bill Clinton was president, that is – although the oversight of policy was accompanied by a near-obsession with investigation of scandal and allegations of

scandal. But when George Bush became president, oversight largely disappeared. From homeland security to the conduct of the war in Iraq, from the torture issue uncovered by the Abu Ghraib revelations to the performance of the IRS, Congress has mostly ignored its responsibilities. (p. 151)

What happened? The oversight literature offers several prisms through which to view variations in oversight activity since the mid-twentieth century. If, as Fenno (1977) has suggested, members of Congress win reelection in their districts by running against Congress as an institution, then we might reasonably assume that those members have no incentive to prioritize oversight, which is in large part an institutional responsibility, over other activities. Members of Congress might also tend to view the bureaucracy as an “impenetrable maze” (Scher, 1963, p. 532) and, thus, oversight of unwieldy government agencies as a decidedly unpalatable and Herculean task. Scher (1963), Aberbach (1991), and Shipan (2005) attribute periods of lax oversight to Congress’s increasing workload since the mid-twentieth century; as a result, they argue, Congress has become increasingly cognizant of the increased opportunity costs of oversight. Other scholars attribute variations in oversight to Congress’s punctuated efforts to assert its own institutional power relative to the executive branch (Kaiser, 1988, Kriner and Schickler, 2014): bursts of oversight activity as well as statutes to enhance the oversight process have increased after consolidations (and, arguably, abuses) of executive power during the Franklin Roosevelt administration, the Nixon administration, and the George W. Bush administration.

Mayhew (2005) notes the precipitous drop-off in Congressional investigative activities after 1980, but attributes this decrease in large part to exogenous factors such as the rise of investigative journalism after the Watergate scandal in the 1970s, special investigative commissions and independent counsels/special prosecutors (see also Kaiser, 1988). As Mayhew points out, “by the time the House Judiciary Committee inherited the Clinton imbroglio in mid-1998, there was virtually nothing left to reveal or expose. An independent counsel’s office plus the media had already performed the labor” (Mayhew, 2005, p. 76). Indeed, Congress has institutionally extended the investigative capacities of independent agencies (located within the executive branch and thus technically still under the president’s purview) over the past several decades: 1978’s Ethics in Government Act, a congressional response to the Nixon administration’s abuses including the firing of Watergate Special Prosecutor Archibald Cox in 1973, established the protocols for appointing and removing independent prosecutors; that same year, Congress created Offices of Inspectors General (OIGs) in all federal departments and major agencies. In 1990, Congress placed agencies under even more scrutiny by passing the Chief Financial Officers Act, which created politically independent CFO positions to oversee the financial management of 23 separate federal agencies. While it is not immediately clear why Congress chooses to create independent oversight capacity rather than enhance its own institutional powers (and vice versa) at

certain points in time, we suggest that political uncertainty motivated by increased partisan competition (see Lee, 2016) might explain why members wish to partially insulate executive oversight from attempts at partisan point-scoring in Congress.

Indeed, the subset of the oversight literature that we find most convincing focuses on oversight as an instrument for partisan teamanship. Partisan polarization has been increasing since the mid-1960s (see Green, Palmquist, and Schickler, 2002, McCarty, Poole, and Rosenthal 2006, Theriault, 2008, and Levendusky, 2009), but for the first time in American history, in the 111th Congress (2009–2011), the most conservative Democrat in either chamber was ideologically to the left of the most liberal Republican (Mann and Ornstein, 2016). Thus, under conditions of high polarization, “divided government”⁶ reflects not simply interparty conflict but also ideological contention, and is also a significant predictor of legislative gridlock. Measured, broadly speaking and as previously discussed, as the proportion of important items on the policy agenda that become law in a given Congressional session, legislative productivity decreases under divided government (Kelly, 1993, Edwards, Barrett, and Peake, 1997, Coleman, 1999, Howell et al, 2000, Binder, 2003, and Rogers, 2005; importantly, however, see Mayhew, 2005). But does increased polarization also affect Congress’s ability to perform its *other* major institutional responsibility? If so, how – and what motivates members to engage in oversight activity in the first place? We argue that these questions are extremely promising avenues for future research, and a number of scholars have already taken up the mantle, empirically assessing whether polarization under divided government adversely affects Congress’s ability to monitor the administrative state and investigate the president. In the 1991 edition of *Divided We Govern*, David Mayhew found no significant difference between the number of “high-profile” executive branch investigations – that is, investigations that garnered substantial media attention – performed under united versus divided government. However, in the book’s second edition (2005), Mayhew reported different results: The number of high-profile investigations over the last decade was greater under divided than under united government. Kriner and Schwartz (2008), using an updated version of Mayhew’s data, confirm these more recent results, while Parker and Dull (2009) find that, under divided government, Congress conducts more investigations of the executive branch and those investigations are significantly longer than they are under united government. (The authors also show that the effect of divided government on Congressional investigations became more pronounced after the 1970s.)

Thus, it appears that under divided government and conditions of high partisan polarization, we might expect Congress to pass *fewer* pieces of

⁶ Divided government refers to a condition wherein the presidency and Congress are controlled by opposing political parties.

legislation (i.e., for gridlock to increase) but to perform *more* oversight. Examining the use of oversight as a partisan weapon is one way to make sense of this apparent puzzle. Ginsburg and Shefter (1990) argue that investigations and legal proceedings have consistently been important tools in the partisan wars, while Shipan (2005) argues that divided government provides an additional incentive to prioritize oversight (see also MacDonald and McGrath, 2016):

In part, [this incentive exists] for policy reasons; policy divergence is most likely to occur under divided government, so the majority party in Congress will want to constrain the agencies under the president's control. In addition, members of the majority party may believe that they can benefit from using active oversight to emphasize policy differences between their party and the president's party, and if in the course of such hearings and investigations they embarrass a president and his agency, this is a not insignificant side benefit. (Shipan, 2005, p. 437)

Kriner and Schickler (2014) and Kriner (2009) show that Congressional investigations of presidential decisions can diminish public support for the president's policy goals as well as his overall job approval, confirming the real-world political ramifications of executive investigations under divided government. Kriner (2010) also shows that criticism of the president by members of his own party during investigative hearings significantly diminishes public approval of the president; thus, under united government, members may have an incentive to either avoid targeted investigations altogether or to attempt to mute the rhetoric and publicity surrounding certain oversight activities. As former Republican representative (and future Obama administration Transportation Secretary) Ray LaHood put it in 2004: "Our party controls the levers of government. We're not about to go out and look beneath a bunch of rocks to try and cause heartburn" (quoted in Oleszek and Oleszek, 2012, p. 52).

Lee (2013) attributes the politicization of oversight to partisan polarization coupled with increased partisan loyalty and cooperation: "It is not only that the congressional parties today are better sorted out in ideological terms, they are also better coordinated in pursuing their political interests" (p. 788). Using an original data set, Lee shows that congressional charges of administrative malfeasance are significantly greater under divided than under united government.⁷ These results match with the patterns we might intuitively expect under divided government: Investigations with a particularly political or partisan bent – oversight, in other words, that offers the opportunity for political point-scoring – occur more frequently under divided government. In Lee's (2015) words: "Despite a frenzy of investigatory activity under divided government, congressional oversight [on the whole] may be less effectual in the polarized

⁷ Lee measures salient congressional charges against the executive branch according to the extent of front-page coverage of those charges in *The New York Times*; she shows that there are a significantly greater number of front-page stories of administration malfeasance under divided than under united government.

era, because of its obvious politicization and the dearth of critical voices from within the president's own party" (p. 272).

Party leaders do seem to be aware of the ability of oversight hearings to damage not just the incumbent president but other major political actors in the executive branch as well, some of whom might have aspirations for the top job. However, and importantly, members' knowledge of the political benefits of oversight does not necessarily indicate that oversight is *motivated* primarily by partisan considerations. For example, in mid-2015, well into the "invisible primary"⁸ for the 2016 presidential race, House majority leader Kevin McCarthy of California praised the Republican caucus for the establishment of the House Select Committee on Benghazi to investigate the 2012 attacks on the US consulate in Benghazi, Libya. Of Secretary of State Hillary Clinton's repeated appearances before the committee, McCarthy said in a Fox News interview: "Everybody thought Hillary Clinton was unbeatable, right? But we put together a Benghazi special committee, a select committee. What are her numbers today? Her numbers are dropping. Why? Because she's untrustable. *But no one would have known any of that had happened had we not fought*" (emphasis ours).⁹ McCarthy's remarks suggest two things: First, that oversight is an effective instrument for achieving partisan electoral goals, whether in presidential races or in what has become an almost biennial battle between the two major parties for control of Congress (Lee, 2016) – and politicians know it. Second, members take oversight seriously: McCarthy frames the Benghazi hearings as a prime example of Congress's effectively checking abuses within the executive branch, and any subsequent political damage to the administration as entirely justified and part and parcel of democratic accountability.

Similarly, in the months prior to the 2006 midterm elections, in which Democrats regained control of both chambers from Republicans, then-Minority Leader Nancy Pelosi and Democratic Congressional Campaign Committee Chairman Rahm Emanuel made the need for investigations into the Bush administration's handling of the Iraq war a central piece of their political platform (Parker and Dull, 2013, see also Goldberg, 2006, Toner, 2006). As Pelosi pithily put it: "We win in '06, we get subpoena power."¹⁰ After their decisive victory, the Democrats made good on their campaign promise to make investigative activity a focal point of their agenda: In just their first 2 months in office, Democratic committee chairs held a combined 81 hearings on the Iraq

⁸ The "invisible primary" refers to the period of approximately 2 years before each party's actual nominating contest, during which fund-raising, early opinion polls, public endorsements, and activist support produce a "front-runner" before the actual primary season begins (see Cohen et al, 2008).

⁹ See Schleifer, Theodore. 2015. "Kevin McCarthy Backtracks Benghazi Comments," CNN.com, October 2. Retrieved from www.cnn.com/2015/10/01/politics/mccarthy-walk-back-benghazi-emails/ (last accessed December 9, 2018).

¹⁰ See Goldberg, Jeffrey. 2006. "Central Casting," *The New Yorker*, May 29. Retrieved from www.newyorker.com/magazine/2006/05/29/central-casting (last accessed December 9, 2018).

war alone (Kriner, 2008). But for Democratic leaders, the political damage their investigations may have inflicted upon the Bush administration was simply a natural side effect of accountability. Oversight, maintained Carl Levin, who became the chair of the Senate Armed Services Committee in 2007, “becomes a significant moral issue”;¹¹ as for the prolificacy of the hearings, in May 2007, House Energy and Commerce Committee Chair John Dingell pointed out that, after years of united Republican government, “we have a huge backlog, and we’ll try to use what we can to get to everything.”¹²

If oversight activities do significantly increase under divided government, as much of the empirical evidence suggests, can we attribute that increase to partisan teammanship and the politicization of a once-august institutional responsibility, or does the increase reflect a Congress finally in the position to demand real accountability from presidents and agency leaders that may have become a bit too comfortable under united government? While House and Senate majorities have clear political incentives to pare back or avoid major investigations when their party controls the White House, does more routine monitoring of the administrative state suffer under united government as well? Performing “police patrol” oversight may exact a powerful opportunity cost if committee resources must be diverted from political investigations that might pay valuable electoral dividends. What’s more, the opportunities apparent in high-profile, politicized investigations may assume priority over lawmaking itself, if members believe that position taking in investigatory hearings confers more benefits than legislating, the latter of which often requires forging compromises and sacrificing ideological purity.

Thus, two major research questions emerge from our discussion of oversight. First is a question not only of degree but also of kind: Under which conditions (divided or united government) does Congress provide *more* oversight, and under which conditions does it provide “good” oversight? We suggest that, while oversight activities on the whole may increase under divided government, we can nevertheless expect to see significantly more measured, nonpartisan oversight under united government. How to define and operationalize “good” oversight, reliably distinguishing between partisan and nonpartisan activities, will be a challenge for congressional scholars, but it may also help researchers move beyond the police-patrol versus fire-alarm dichotomy and expand the conceptualization of meaningful oversight to include, as previously discussed, delegation to nonpartisan agencies such as the GAO, the Congressional Research Service, and inspectors-general. The Republican congressional

¹¹ See Babington, Charles. 2006. “Incoming Chairmen Ready to Investigate,” *Washington Post*, December 16. Retrieved from www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501680.html (last accessed December 9, 2018).

¹² See Hearn, Josephine, and Jim VandeHei. 2007. “The Oversight Congress: Trouble for Bush,” *Politico*, May 22. Retrieved from www.politico.com/story/2007/05/the-oversight-congress-trouble-for-bush-004137 (last accessed December 9, 2018).

majorities' track record in holding the Trump administration accountable for alleged abuses will also provide much qualitative fodder for political scientists over the next few years. In a *Washington Monthly* piece published right before Trump's inauguration, Daniel Stid (2017) argued that there was reason for optimism about the Republican Congress's willingness and ability to strengthen its oversight capacity and effectively monitor President Trump. How well Republicans have fared at checking Trump's executive management will become clearer as time passes and more data becomes available. However, the House Intelligence Committee's decision, in March 2018, to end its investigation of alleged Russian efforts to aid Trump's presidential campaign (and of alleged collusion between the Trump campaign and Russian agents) despite the ongoing probe by Justice Department-appointed Special Counsel Robert Mueller suggests that Congress might decide to take a backseat to nonlegislative actors precisely to avoid a direct political line from Republican leaders in Congress to their party's leader in the White House.

The Mueller investigation itself, aside from any concomitant congressional probes, illuminates the dearth of statutory checks on executive authority, an important component of oversight. There exists no immediately obvious recourse should Trump decide to fire Mueller, who was appointed by Deputy Attorney General Rod Rosenstein when Attorney General Jeff Sessions recused himself from the process.¹³ The aforementioned Ethics in Government Act, which Congress passed in 1978 and reauthorized in 1987 and 1994, expired in 1999 and has not been reauthorized since, rendering the appointment and removal of special counsels solely unto Justice Department regulations. Trump, who considered firing Mueller twice and was talked out of it by White House officials (see Haberman and Schmidt, 2018), has made no secret of his distaste toward Muller's investigation – he has called it, among other hyperboles, the “greatest witch hunt in history” – and a bipartisan group of legislators has pushed for new legislation that would protect Mueller against Trump's making good on his repeated threats to dismiss the special counsel. The Special Counsel Independence and Integrity Act was introduced by two Republican and two Democratic senators, and in late April 2018 was approved 14–7 by the Judiciary Committee, earning the support of Judiciary Chair Chuck Grassley (R-IA) and three other Republicans on the committee. Senate Majority Leader Mitch McConnell has said publicly that he will not bring the bill to the floor, and it is highly unlikely that the bill or its House counterpart would make it to the House floor under Republican control. However, this particular legislative

¹³ Sessions recused himself in order to comply with Title 28, Chapter I, Section 45.2 of the Code of Federal Regulations, which stipulates that agency officials shouldn't participate in any “criminal investigation or prosecution if [the agency official] has a personal or political relationship with . . . an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization.” Sessions was an early Trump supporter and served as a senior advisor on his campaign.

battle underscores not only important lacunas in Congress's capacity to check presidential authority but also the constitutional ambiguity over what, precisely, prosecutorial discretion enables the president to do – and how far Congress can go to rein him in. The reauthorized Ethics in Government Act was challenged in the Supreme Court in 1988, and while the law was upheld 7–1 in *Morrison v. Olson*, Justice Antonin Scalia's dissent maintained that the establishment of an independent Office of the Independent Counsel violated the separation of powers by infringing on the executive's "exclusive control" over the exercise of prosecutorial power. These constitutional questions – which have been side-stepped by current protocols that place the special counsel's office firmly under Justice Department control – have already resurfaced as Congress attempts to establish control over Mueller's investigation while keeping its own probes alive.

The second major research question that emerges from our discussion of oversight is: do members of Congress prioritize oversight (particularly but not necessarily limited to politically motivated investigations) at the expense of lawmaking under divided government? As discussed, McCubbins and Schwartz (1984) have shown that members of Congress favor retroactive "fire alarm" oversight over preemptive "police patrol" oversight due to the resource and opportunity costs of the latter, and other work suggests that members may perceive an overall opportunity cost to ensuring bureaucratic compliance with congressional directives (see Scher, 1963, McCubbins, Noll, and Weingast, 1987). Because there is little direct link in the extant literature between oversight and members' goals – primarily reelection (Mayhew, 2004); plus advancement within the institution and making good public policy (Fenno, 1995); plus prestige and ambition for higher office (Cox and McCubbins, 1993) – we might simply assume that members will favor the imminent and tangible rewards of legislating over the more ambiguous benefits of oversight. But as partisan polarization and legislative gridlock have increased over the past few decades, there is reason to suspect that the instruments by which members use to achieve their goals may have shifted. In what is arguably the most highly polarized era in congressional history, during which partisan competition has become a consistent feature of legislative politics, might members derive more benefits from oversight, and the political damage it inflicts, than from policymaking itself? Thorough empirical research into this question will help clarify the nature of gridlock: If members of Congress aren't passing as many bills as they used to, what *are* they doing, and why? Is the decision to forego legislating for oversight a conscious decision made with an eye to electoral outcomes, or is it simply a natural consequence of the inability to get broad-based legislation approved by highly polarized chambers?

CONSIDERING IMPLICATIONS

Governing is complicated. Citizens expect both effectiveness – the provision of policies that function smoothly and efficiently to solve problems – and

democracy, or responsiveness to widely shared priorities and full and fair inclusion of a diversity of views. The inherent challenges of collective action operate perennially to raise the voices of the well-heeled and well-organized over those of ordinary citizens. American political institutions, by design, present a series of obstacles to swift action and require officials to build broad coalitions of support if they are to overcome multiple hurdles required to enact laws – and to oversee those laws over the long term after they have been enacted. In recent decades, growing partisanship, rather than smoothing the process of building consensus, has in many respects made it more difficult to attain. In the midst of these circumstances and interacting with them, the polycscape presents yet another formidable challenge to effective governance.

Existing policies also affect the lawmaking process. They set much of the policy agenda, channeling reform efforts and influencing whether new policy alternatives are apt to be feasible or not. They hinder the creation of bold new policies, but they may ease the path of incrementalism. The existence of a wide array of policies means, on the one hand, that lawmakers in the past have acted to address myriad needs and those laws remain on the books and presumably make Americans better off than they would be in their absence. Yet, on the other, policies do not continue to function on autopilot to work as effectively as they once did, and they need to be maintained and subject to oversight. Growing partisanship makes the likelihood that policies will be cared for effectively less likely.

Ordinary citizens likely have little awareness of how much Congress is actually accomplishing in one period of time compared to another, particularly in terms of policy maintenance and oversight, but they are quite aware of the escalation of dramatic government failures (Light, 2014, Kamarck, 2016). They may also acquire a sense of less dramatic but real forms of deterioration, such as the decay of roads and bridges, the failure of schools to improve, insufficient public services, and so forth. If so, such perceptions may help to fuel the anti-government attitudes of our time. These questions, like many others we have raised, await further inquiry.

What is apparent to us is that modern political development in the United States has brought us to a perplexing time, when citizens' expectations of government in many ways outstrip the capacity of the political system to deliver. The institutional obstacle course set forth in the US Constitution combined with the complexity of our vast array of existing policies render the task of governance one that requires public officials who are knowledgeable about public policy, have the commitment to tending to it, and who are willing to compromise and negotiate for such purposes. Yet the deeply divided party system of our times operates in a manner that is antithetical to such goals.

One consequence of these developments is that presidents are left with far greater capacity than Congress to manage the executive branch and to drive the direction of policy implementation. The administrative state is enabled to flourish, virtually unchecked by Congress. Instead, the legislative branch

increasingly focuses its oversight activities on a few matters that can be exploited for partisan purposes, rather than general monitoring of how well policies are functioning. This leads to arrangements quite different from the traditional understanding of separation of powers. Congress risks turning into a calcified institution that is incapable of performing its constitutionally ordained roles. By choosing to devote itself primarily to partisan battles, the institution is participating in making itself increasingly irrelevant. Meanwhile, existing policies are left to function unsupervised and to fall into disrepair or go off the rails. These trends undermine Congress's ability to govern responsively, the nation's laws' capacity to function well, and perhaps most worrisome of all, Americans' confidence in government.

How can the United States, in the twenty-first century, revitalize its capacity to govern effectively and in a manner that maintains and better realizes its democratic ideals? That is the challenge of our time.

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