Re-Setting the Agenda: Estimating Congressional Responsiveness to to Fire Alarms in the DC Circuit Court of Appeals

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Evaluating the effects of bureaucratic policymaking requires a systematic way to evaluate the policies that emerge over time. Such a measure would allow us to understand the substantive policy effects of agencies' implementation choices over time. This paper raises the following core question: To what extent, and under what conditions, do congressional coalitions respond to interest group fire alarms raised through the DC Circuit by statutorily amending administrative capacity? I argue that agency losses through DC Circuit litigation should raise signals to Congress that the agency has drifted in its implementation behavior, and spur it to amend legislation to better constrain the agency's latitude. I evaluate this in the context of the Environmental Protection Agency from 1973 to 2010 using a rich new dataset comprising the 2,000 statutory amendments to the legislation under the jurisdiction of the EPA, each of which is hand-coded to determine the magnitude of the congressional revision, as well as the DC Circuit cases in which the agency was the defendant. I find robust support for the claim that agency losses are associated with subsequent statutory constraints on the agency, but do not find strong support for the claim that executive branch vulnerability is predictive of congressional interventions.

Central to American lawmaking is the issue of strategic delegation and choices of statutory implementation, particularly amid rising polarization both within and across the branches (McCarty, Poole, & Rosenthal 2006). In light of this institutional conflict, this article raises the following question within the domain of environmental law: To what extent do fire alarms through the DC Circuit Court of Appeals provoke Congress to revise delegating legislation to better control agencies? While a range of conditions can expand administrative agencies' policymaking flexibility when their preferences diverge from Congress's policy choices, extant methods do not allow for the systematic, large-scale assessment of the policy change that follows. By providing a new metric of policy volatility, this paper allows for new evaluations of congressional responsiveness to interest group fire alarms by way of appellate litigation, and the longer-term ramifications with respect to policy durability and agency latitude over time.

A number of scholars have worked to characterize the tools at Congress's disposal in overseeing the administrative agencies to which it delegates, aiming to induce compliance with its preferences. Congress can exercise both *ex ante* controls on agency structure to preserve the enacting legislature's preferences, as well as *ex post* controls that members can continue to deploy such as appointments and budget sanctions. While Congress has the ability to engage in ongoing oversight of agency actions, "fire alarm" oversight has been characterized as a more rational alternative for Congress to pursue, facilitating relevant interests to call attention to potential violations and in turn paving the way toward congressional interventions when appropriate (McCubbins & Schwartz 1984). Such an approach allows for more of the costs of agency monitoring to be borne by citizens and interest groups, and in a political setting in which "legislative goals are refined, elaborated, and even changed over time in response to new problems – including complaints against executive agencies," members of Congress answering fire alarms can both better define and enforce compliance with legislative goals (Id at 171). What has been relatively understudied empirically, however, is the extent to which Congress actually responds statutorily to the alarms raised by interest groups and other actors through

the litigation process.

Statutes have been the dominant mode of the development of American democracy. Moreover, amid America's "republic of statutes," public deliberation over fundamental rights and commitments "has migrated, relatively speaking, away from Constitutionalism and toward legislative and administrative constitutionalism" (Eskridge & Ferejohn 2010: 16). Statutory law and the agencies to which Congress delegates touch on virtually very facet of law and policy with which individuals interact from day to day. The study of statutes to date has neglected their dynamic nature, which I argue is a critical dimension of how law, policy, and the American state develop over time. Such a dynamic conception of lawmaking better captures the realities of the increasingly complex, amendment-based nature of modern statutes, as well as the ongoing nature of inter-branch interactions in shaping policy outcomes over time. Indeed, in reference to Moe's (1989) widely-cited claims that Congress can constrain agencies through durable but inefficient structural design, Patashnik holds that the "institutional development story must be followed all the way through" (2008: 157) in order to capture downstream structural developments in the policies being implemented because "the game doesn't end when the laws are adopted" (Id at 10).

A large and growing body of literature has sought to characterize legislative agenda-setting and to predict the incidence and timing of policy change amid different political configurations (see, *e.g.*, Krehbiel 1998; Binder 2003; Cox & McCubbins 2005; Brady & Volden 2006). A limitation to the modal gridlock analyses is their restriction to policy *inputs* – that is, the bargaining processes at work and the logrolling going into the original delegating statute to secure its final passage – and in turn, static lawmaking analyses that end with the passage of the final statute. However, with the persistence and growth of divided government, such that Democratic congresses are relying in part on Republican administrations (or vice versa) to carry laws into effect, administrators holding policy preferences of their own may in fact be more than mere rote implementers of these laws that emerge through the veto gates.

Furthermore, rather than creating a new administrative apparatus such as with the Communications Act of 1934 or the Fair Labor Standards Act of 1938, Congress increasingly has turned to amendment-based lawmaking strategies which may result in mere incrementalism, but can potentially yield marked deviations from the status quo policy, particularly in the aggregate over time. A single law may receive dozens if not hundreds of statutory amendments over time, while others remain virtually untouched. Some laws receive considerable attention at fixed points in time while others receive more ongoing attention. However, no work to date has sought to systematically account for the nature of policy change within a law over time when there is heterogeneity within the statute. Heterogeneous laws have become increasingly common as Congress turns to omnibus legislating (Krutz 2001) and the inclusion of statutory provisions to buy support and better ensure final passage. Moreover, even apart from the large omnibus appropriations packages, the high acceptability of this pork barrel legislating has led to the passage of laws touching on more diverse arrays of topics than what was observed in earlier decades (Krutz 2001). This process of pooling multiple policies into single statutes makes more complex the estimation of policy change over time, in addition to bringing to light the diverse ways in which litigation and other political pressures can shape ongoing congressional attention to statutory delegations over time.

This article argues that while scholars have made ample progress in understanding the tools at Congress's disposal in working to constrain the administrative agencies to which it delegates, as well as conditions under which congressional coalitions are successful in shifting the policy status quo, these literatures have not been adequately linked in allowing us to understand such questions as, How well do these tools work in insulating Congress against ongoing oversight of the implementing agencies? To what extent does ongoing congressional attention to the delegating legislation result in changes in policy? Understanding lawmaking in this more dynamic setting will allow scholars to more accurately characterize the amendment-based legislative process over time and to understand to what extent alleged noncompliance of

agencies results in meaningful revision to administrative capacity moving forward.

Utilizing the Yaver (2015) data on litigation against the Environmental Protection Agency from 1973 to 2010, and creating a rich new dataset on statutory policy change through the 2,000 statutory amendments from that same time period, I argue that fire alarms raised by interest groups through litigation in the DC Circuit, anticipated extent of third-party monitoring through the courts, and the electoral vulnerability of the executive branch, fundamentally reshape the stability of policy over time and the latitude with which the Environmental Protection Agency is able to implement delegating statutes in subsequent years. I find strong, robust support for the effects of courts in spurring Congress to take legislative action with respect to these statutes, but do not find support for the effect of presidential weakness.

Bureaucratic Drift in the United States

A common characterization of the relationship between legislators (principals) and bureaucrats (agents) is the delegation framework of lawmaking. According to this well-developed line of scholarly inquiry, when Congress writes a law in which there is some complexity or uncertainty that incentivizes blame avoidance or the drawing on policy expertise, Congress opts to delegate rulemaking and/or enforcement authority to the agency while maintaining certain administrative procedures and statutory specificity so as to maximize its gains with respect to expertise while still guarding against potential bureaucratic drift (*e.g.*, McCubbins & Schwartz 1984; McNollGast 1987, 1989; Banks & Weingast 1992; Bawn 1995; Epstein & O'Halloran 1999; Bendor, Glazer & Hammond 2001; Huber, Shipan & Pfahler 2001; Huber & Shipan 2002; Volden 2002). Should the agency fail to act in a manner consistent with the statute, it would face punishment deemed undesirable in equilibrium given agencies' presumptive prerogatives for institutional power. Thus, what we ultimately observe in most cases is bureaucratic compliance (however, see Gailmard 2002; Huber & McCarty 2004).

Yaver (2015) challenges this assumption, claiming that scholars have under-appreciated the

reach of bureaucratic discretion amid heightened partisan conflict within Congress, a setting that is not ripe for efficient congressional oversight of bureaucracy and that is all the more prevalent in recent decades given documented rises in polarization and legislative gridlock (McCarty, Poole & Rosenthal 2006; Wawro & Schickler 2006; Lee 2005; Binder 2003; Krehbiel 1998). While theories often articulate the mechanisms of congressional control of bureaucracy (*e.g.*, McCubbins & Schwartz 1984; McNollGast 1987, 1989; Callander & Krehbiel 2014), scholars have paid insufficient attention to the extent to which these constraints on agencies are indeed effective in inducing compliance and thus ensuring that bureaucratic control does not break down due to an agency dragging its feet (shirking) or being overly zealous in the reach of its implementation. And even if it is true that "the freedom of the agency to move policy without legislative interference is a feature, and not a bug, of institutional design" (Callander & Krehbiel 2014: 820-21), there remain important normative issues of democratic accountability in the agency's policy implementation.

While evaluating compliance is complicated by the vagueness of *with what* agencies must comply, given both statutory complexity and changing congressional preferences over implementation, those institutions and individuals tasked with monitoring administrative agencies are empowered statutorily to hold agencies accountable, thus guarding against potential deviations from the statutory text to which courts expect them to adhere (Landes & Posner 1975). Legislative-executive disagreement and ideological disagreement between the chambers of Congress, which is associated with a limited ability for Congress to shift the status quo (Krehbiel 1998; Binder 2003; Brady & Volden 2006), and agency disagreement with the statute location were found to powerfully contribute to the EPA's pulling policy toward its preferences, while the provision for congressional provision for citizen suit litigation against the agency was found to constrain the agency's range of policymaking choices (Yaver 2015). The findings suggest that the separation-of-powers conflict prevalent since the late 1960s has expanded agency latitude beyond what the dominant delegation theories predict. However, to better understand

what explains not just the de jure policies outlined in statutory texts but also the de facto, observable policy outcomes, then we must be able to estimate also the policy *effects* of this bureaucratic behavior.

Theories of Policy Change

Estimating changes in policy and preferences has piqued the interest of scholars engaged in wide-ranging agendas – from measuring doctrinal change on the Supreme Court (*e.g.*, Baum 1995) to measuring moves between liberalism and conservatism in policy adoption to capturing movement from the status quo when gridlock has been broken – though scholars are consistently faced with a number of empirical challenges. While many public policies are considered subject to drift and others "bombarded by it" (Callander & Krehbiel 2014: 819) with drift caused by sources ranging from changes in demographics to innovations in technology, delegation has been considered a mechanism through which governments can accommodate this potentially inevitable drift (Id). Many have sought to explain the patterns and extent of policy change that we should observe amid varied political configurations, with policy stability typically increasing with the number of veto players and their distances from one another, and reflecting the difficulty of making significant departures from the status quo (Tsebelis 2002: 37). Thus, the number of significant laws that a legislature passes should be decreasing as a function of ideological distance between the parties or key players, and increasing as a function of the distance between the previous government and that currently in power given the desire to undo the policies of an ideologically distant regime (Id at 165). Such claims are consistent with the argument that to evaluate a given policy's stability over time, we must consider both the current and the prior institutional configurations, as well as bureaucratic behavior given congressional allocations of discretion.

There is a further question of whether policy change tends to be incremental, immune to radical change, or subject to ebbs and flows. Hall (1993) ultimately notes that in the American lawmaking system, most policy changes are only marginal, though there periods of fundamental

changes, or "punctuated equilibria," at which point Baumgartner & Jones observe that crises do occur as the American public and policymakers reshape their understandings of the problems at hand, a prominent example of which is the aforementioned ACA. An important consideration in evaluating significant legislative change versus the politics of incrementalism is whether to consider policy change in the *aggregate* – that is, producing important changes *over time* in the scope of administrative capacity – versus characterizing incremental legislation as non-significant as Tsebelis (2002: 180) does.

Ainsworth & Hall provide one of the lone treatments of incremental policymaking and outline three strategic reasons for legislators' pursuit of incremental policy change: the trade-off between vote maximization and the policy gains of legislative proposals, members' incentives for engaging in legislative effort and sabotage when being faced with public scrutiny, and members' informational constraints and their effect on the breadth of policy change that legislators seek (2011: 39-40). Thus, among legislators' considerations is the interest in ensuring passage, often by way of moving to the center so as to gain the necessary majority coalition. Moreover, legislative gatekeepers' risk aversion leads them to trade policy gains for votes as the prospects of legislative passage increase. Amid heightened partisan conflict and difficulty in moving legislation through the veto gates, incremental changes may be easier to explain and defend than radical reforms that may be discordant with key congressional coalitions (Id at 43). Thus, the barriers to final passage are simply lower when putting forward more modest policy proposals than a new administrative apparatus that will provide a shock to the status quo. But while incremental changes minimize the policy gains reaped at each individual stage of congressional attention to an issue, each incremental move may importantly push policy forward over time.

A number of well-cited theories of lawmaking have sought to explain the conditions under which policy change is feasible, though such efforts have not resulted in a systematic quantification of that policy change and its direction. Krehbiel (1998) argues that legislative productivity varies according to the location of the status quo with respect to the gridlock interval, with

changes to the status quo possible only when that policy lies outside the gridlock interval. Brady and Volden (2006) hold that to explain and define gridlock, one can think of members of Congress as being arrayed on a left-right continuum, and to determine whether effective policy change is possible, one must know the policy preferences of median members of Congress and determine where their preferences lie in relation to the status quo. Thus, the median voter's preferences are a critical determinant of the policies ultimately adopted. In both models, we observe major policy change only when the status quo is further from crucial members' (whether the pivot or the median) preferences than is the proposed alternative policy. What remains understudied is the extent to which we can observe ongoing policy movement away from the status quo as a consequence of the continually shifting (to various degrees) political makeup of the institutions.

Measuring Policy Change

To evaluate the effect of fire alarms through the DC Circuit in provoking congressional monitoring of agencies required the development of a rich new dataset tracking statutory policy change by way of amendments. One way that this has been achieved in existing literature is through the identification of roll calls on the subject of interest. The use of roll call votes to identify statutory amendments can systematically identify those bills for which the relevant provisions are central, as in Clinton's (2012) analysis of wage and hour amendments to the Fair Labor Standards Act, which importantly calls attention to certain disconnects between lawmaking theoretical predictions and empirics, at least under certain conditions of partisan conflict. However, such a strategy will not capture the wealth of amendment activity that occurs within other laws, whether in related statutes of different names (e.g., other, more heterogeneous labor legislation or a comprehensive environmental package) or in omnibus legislation (e.g., omnibus budget reconciliation acts).

For example, while Congress may pass a new environmental law, it may also insert a hand-

ful of environmental provisions into an omnibus budget reconciliation act, which makes the estimation of policy change (particularly that which is only incremental) considerably more challenging. After all, apart from the Clean Air Act Amendments of 1970, the Clean Air Act Amendments of 1977, and the Clean Air Act Amendments of 1990, Congress also amended the Clean Air Act in laws with titles including "Steel Industry Compliance Extension Act 1981," "Tax Reform Act of 1986," and the "Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992," none of which would likely be reflected in analyses of roll call votes on Clean Air Act amendments over time. This is particularly important given that the policy captured by these different statutes may be substantively distinct in ways that are central to this study. Not only has the use of omnibus legislation proliferated since World War II, but such laws are often assembled in order to ensure passage of policy that otherwise faces uncertainty (Krutz 2000: 533). Thus, within these often must-pass omnibus bills in which one will find some widely-supported policies, one may also find policies that might be too controversial to garner the support necessary to pass on their own merits.[1] Such information might well be important to an analysis of the extent to which policy changes are ultimately enacted.

Figure 1 plots with respect to the Clean Air Act a comparison of the number of statutory amendments identified based on THOMAS searches within statutory texts versus based on the titles of statutes. Relying on the phrase "Clean Air Act" to appear in the title of an amending law results in a mean of 0.3 amending statutes per Congress and a maximum of 2, compared with a mean of 7.1 and a maximum of 16 amending statutes per Congress when searching for amendments anywhere within a given text. The dramatic differences that one can see here reinforces the paper's claim that such reliance on bill titles and the names of roll calls results in systematic under-counting of amending legislation and in turn, the trajectory of policy change over time.

[1]Krutz (2000) acknowledges the potential benefits of using omnibus legislating, citing proponents who claim that it enables legislative productivity in a process otherwise rife with gridlock and veto players.

To capture the universe of relevant statutory amendments, I identified from the EPA website the 26 statutes that the agency implements in whole or in part. For each year beginning in 1973 or the year in which the law was enacted, I conducted Lexis searches within the public laws. These searches returned a total of 2,000 statutory amendments from 1973 to 2010 across these 26 statutes, with an average of approximately 3 laws per year per EPA statute.[2] Within each of these amendments, I coded for whether Congress created technical amendments, added oversight provisions (*e.g.*, reporting requirements consultation requirements, sunset provisions, appointments limits, audits), changed appropriations, amended enforcement provisions (*e.g.*, those provisions pertaining to administrative adjudications or litigation), or adding to the detail of the statute by way of adding prohibitions or requirements of regulated entities, agency rules, definitions, exemptions from regulation, or rules of application or construction. These variables were hand-coded through reading and conducting word searches in the amending texts from the Statutes at Large. Figure 2 presents a histogram of the distribution of types of statutory amendments represented in the dataset. While changes to appropriations levels, or appropriations cycles, is by far the most frequent type of statutory amendment undertaken, occurring 675 times among the 2,000 observations, there nevertheless is a meaningful diversity of methods that congressional coalitions employ to revise agency latitude, whether by adding definitions so as to clarify the bounds of the statute (159 times), imposing new oversight provisions (224 times), or adding provisions specifying to whom the statute does (160 times) or does not (140 times) apply. And whether Congress turns to procedural, appropriations, or statutory detail tools has implications for future legislative-executive interactions as well as the ways in which those statutes will ultimately be interpreted in court.

To determine whether this set of dummy variables could reasonably be collapsed into a single measure, I evaluated the Cronbach's alpha, which is measure of internal consistency, or

[2]While there are 2,000 observations, they are only 917 separate laws. Omnibus appropriations packages often amended multiple environmental laws in a single statute, as many as 10.

the extent to which a set of items are related in a group. The Cronbach's alpha was .82, which is considered sufficient for scale reliability (DeVellis 2003). Further, the item-test correlations are all fairly high and similar to one another. Thus, I created the variable *specificity scale*, which ranges from 1 to 10 depending on the number of different types of statutory amendments that Congress passed at a given time. I then averaged the scale by statute by year, with the resulting value being continuous between 0 (if no amendments were passed that year) and 8 with an average of 1.79. Higher values indicate higher rates at which Congress is taking a delegating statute to task, while lower values indicate that the statute was left at least relatively untouched.

Theories of Statutory Control

Having described the construction of this original measure of statutory control of bureaucracy, I proceed to discuss the theories according to which I expect Congress to reenter the lawmaking game to better restrict the agency's latitude.

That congressional control of agencies will be only imperfect is not a novel claim. Indeed, it is understood that a motivating factor for statutory vagueness is that "[w]hen legislators try to write laws with sufficient detail and precision to preclude administrative discretion, they quickly run up against their own cognitive limits: beyond a certain point, human beings just cannot anticipate all the contingencies that might arise" (McCubbins & Schwartz 1984: 175). That is, while legislative principals have at their disposal a number of tools with which to constrain the range of actions available to their administrative agents, there will inevitably remain some room for bureaucratic drift.

The very notion of fire alarm oversight relies upon the assumption that interest groups and others affected by a given statute's implementation will have the incentive to monitor how the law is being carried into effect and to call attention to potential violations. While a wealth of agency actions may be too trivial to garner the support needed for DC Circuit litigation

– that is, there is meaningful potential for *unobserved drift*, or drift that is not great enough to warrant bearing the costs of legal action – I argue that instances in which the DC Circuit finds the agency to be unquestionably at fault constitute examples of *observed drift* and thus opportunities for congressional intervention by way of statutory amendment. Thus:

H_1: Congress will be more likely to extensively revise legislation when the DC Circuit has ruled that the agency has deviated from its statutory directives.

The extensiveness of the judiciary's actual interventions in agency latitude need not be the only way in which the courts can constrain agency actions, given agencies' strategic behavior and ability to anticipate how a panel would rule on a matter should it be taken to court. Indeed, the ideological orientation of the judiciary is well-known and thus can, in itself, shape other institutions' anticipations of how the courts *might* respond to suits aimed at administrative capacity to implement. Should the judicial and executive branches be ideologically aligned, the Court of Appeals may be less aggressive in its invalidation of agency actions, whereas when the branches are more ideologically divergent, the court may be less deferential in its oversight of agency implementation. Thus, knowing the ideological location of the courts should provide valuable information as to how vigorously the courts likely would monitor the behavior of agencies, and thus the extent to which Congress must itself become involved in oversight:

H_2: Congress will be less likely to engage in ongoing micromanagement of agency latitude when the DC Circuit and the executive branch are more ideologically divergent.

The extent to which an agency will be responsive to congressional preferences is likely to be dependent at least in part on the political environment in which the institutions operate. Shipan (2004) finds that the extent to which an agency can act autonomously versus needing to be responsive to committee preferences depends on whether it is to the left versus the right of the committee, with the agency being more constrained (responsive) in the latter case. Moreover, Moe and Howell argue that courts "can decide against presidents when, perhaps

as a result of unwise ex ante political calculations, presidents take actions that are highly unpopular with the public, Congress, and opinion leaders" (1999: 152), thus affirming the notion that agency autonomy is linked to some degree with support for the policy being executed. Though I have discussed above implementation by administrative agencies, they fall within the executive branch, headed by the president's political appointee and thus can be construed to have preferences that are largely aligned with the president and his agenda. While Congress may be less likely to challenge the latitude of a popular presidential administration, its willingness to intervene in administrative capacity may increase with greater vulnerability of the president, whether stemming from public opinion or impending change in presidential control. Thus:

H_3: Congress will be more likely to statutorily restrict agency latitude when the president is politically weak.

I turn now to the data that I use to estimate the extent to which, and conditions under which, Congress takes these delegating laws to task.

Independent Variables

To evaluate the effects of fire alarms being raised through DC Circuit litigation, I utilized the lawsuit data utilized in Yaver (2015), which comprise 540 DC Circuit cases, measured at the statute-year level, in which the Environmental Protection or its administrator was the defendant. Each case was hand-coded to determine whether the agency won (or the case was otherwise dismissed, such as for issues pertaining to ripeness or standing), whether the agency lost on procedural grounds (*e.g.* having too short a notice-and-comment period with respect to a given rule that it promulgated), or whether the agency lost on substantive grounds(*e.g.,* the promulgation of a rule that was contrary to the delegating statute and/or the legislative intent.

145, or 26.2%, of the 554 cases resulted in substantive losses by the EPA. 438 of these cases were mixed panels – that is, panels with at least one Democratic-appointed judge and at least one Republican-appointed judge, as opposed to unified Democratic (Republican) panels of

judges. Despite the high rate of bipartisan panels, 458 of the 554 cases resulted in unanimous holdings. While there is a norm of unanimity on the Court of Appeals and a number of scholars have probed the ways in which judges on three-judge panels can shape one another's votes (*e.g.*, Boyd, Epstein, & Martin 2010; Farhang, Kastellec, & Wawro 2015), scholarship has emphasized those cases in which there is a stronger linkage between judge characteristics and the substantive issues at stake (for example, the effect of gender on sex discrimination cases, or the effect of race on affirmative action cases) than one would expect to find in the administrative law cases that comprise this dataset. The rate at which the EPA lost on substantive grounds was comparable among those mixed panels (25.6%), as well as on those panels in which there was neither a dissenting nor concurring opinion – that is, those on which the decision was reached with only a single opinion joined by all of the judges (23.6%). Thus, I do not expect panel effects or panel composition to influence judicial decisionmaking within this context of agency implementation.[3]

I control for the *presidential disapproval* by averaging for each year the rate of disapproval in Gallup surveys of opinion on the President of the United States, which reports both approval and disapproval ratings.[4] Such data allow me to gauge the extent to which the president is vulnerable in the public eye. *Presidential election year* is a dummy variable taking the value of 1 if it is a presidential election year, and 0 otherwise. I control for whether the period is one of *divided government*, which is a dummy variable taking the value of 0 if both chambers of Congress are controlled by the party of the president and 1 otherwise.[5] To account for the extent of interest group activity around the policy, I include the number of *environmental groups*,

[3]Further, the rate at which the agency lost on substantive grounds did not vary markedly when looking within the cases in which an election took place between the case being heard and decided, and when those elections resulted in changes in executive branch or congressional party control. Thus, changes in the party of other political principals does not appear to shape the DC Circuit's propensity to rule favorably with respect to the agency.

[4]Relying on approval rather than disapproval ratings produces comparable results.

[5]The only years in the data in which there is a divided Congress are 1981 to 1986, which I code as divided government.

identified from the Policy Agendas Project. A limitation to this measure is that it provides a raw count of the number of groups engaged in environmental politics, and not the ways in which these groups are involved or how influential they are relative to one another. However, it provides at least a rough sense of the extent of mobilizing forces around environmental politics, which should be able to put pressure on political principals through litigation in the DC Circuit or more directly to Congress in order to spur statutory change.

To account for congressional coalitions' desire to undo the work of past coalitions, I include the *distance between Congresses*, which is the absolute value of the NOMINATE distance between the contemporary flood median and that of the last Congress that amended the given statute. Larger values indicate that the contemporary congressional coalition is more ideologically distant from that coalition that last revised the legislation in question, while smaller values indicate that the coalitions are in agreement with one another. When the value is zero, it is the same Congress or one with the exact same ideal point.

There is the possibility that there mere passage of time will introduce new conditions to which laws are being applied, necessitating greater congressional attention. That is, a law that was passed fairly recently may be better equipped to enforce the issues that motivated the drafting of the statute than is an older law being fit to newer conditions that may not have been envisioned by the enacting legislature. To account for this, I control for the *years since enactment*, which is a linear trend that is the number of years between the given year and that in which the statute was enacted.[6]

Empirical Model

[6]Thus, in 1978, *years since passed* would be 6 for the Federal Water Pollution Control Act of 1972, 2 for the Resource Conservation and Recovery Act of 1976, and 40 for the Federal Food, Drug, and Cosmetic Act of 1938.

The data are measured by statute by year, and thus are time-series cross-section, with the units (N) of the 26 statutes implemented in whole or in part by the Environmental Protection Agency and the periods (T) of the 38 years ranging from 1973 to 2010.[7] Model 1 presents the dependent variable of the average *specificity scale*, measured by statute by year, and the value is continuous between 0 and 8. Models 2 and 3 estimate the frequency with which Congress introduces amendments addressing only*procedure and enforcement* and amendments addressing only *language detail*, with values ranging from 0 to 9 and from 0 to 8 respectively. While not strictly speaking continuous variables, their ranges are such that linear models have been shown nevertheless to perform well.[8] Finally, model 4 estimates Congress's *success rate* in amending the given statute – that is, it is the ratio of amendments to bills introduced. The value is continuous between 0 and 1, with high values associated with greater degrees of success in passing legislation working to revise the delegating legislation. This last estimation thus enables one to evaluate legislative efforts to restrict agency latitude despite not overcoming the numerous veto players in the legislative process, and to probe the conditions under which coalitions meet with greater success in actually taking these laws to task.

A concern common to time series data is that of autocorrelation, in which the errors within units are temporally correlated and thus models failing to account for this nonsphericity can produce incorrect standard errors. Performance of a Wooldridge test produced a highly significant test statistic in all four model specifications, such that I can strongly reject the null hypothesis of no serial correlation. While one way to correct for serial correlation is the inclusion of a lagged dependent variable (LDV), Achen (2001) cautions against this approach because of LDVs' propensity to suppress the effect of substantive coefficients, leading scholars to reach potentially inaccurate conclusions. Because of the continuous nature of the dependent variables

[7]However, some of the statutes were passed in later years and thus have shorter time series.

[8]Indeed, Angrist & Pischke (2009: 103) hold that even in the context of statistical estimation with binary dependent variables, the choice of a nonlinear model matters little with respect to the estimation of marginal effects.

that I present, I ran generalized least squares (GLS) with unit (law) fixed effects and an AR(1) disturbance to correct for the serial correlation present in the data, using the method developed by Baltagi & Wu (1999).[9] This approach has the advantage of not requiring balanced data, as the statutes under the EPA's jurisdiction that comprise the units in my data were passed at different points in time. While a common approach to modeling time-series cross-section data is the use of panel-corrected standard errors (PCSEs) to address contemporaneous correlation, such an approach fails to account for unit heterogeneity that is addressed through the inclusion of fixed effects, and Kristensen & Wawro (2003) call attention to the bias and inconsistency induced in OLS slope coefficients when unmodeled unit effects are correlated with explanatory variables. Because running regressions with non-stationary variables can produce spurious results, I performed a Fisher-type test for nonstationarity given that this test does not require strongly balanced panels. With respect to all variables, I was able to reject the null hypothesis of all panels containing a unit root. The model specifications are linear, and thus the results can be interpreted directly.

Findings

I begin by discussing the factors contributing toward the overall extent to which Congress takes these statutes to task, as indicated by the *specificity scale*. The results are presented in Table 1. Consistent with expectations, I find that higher rates of losses on substantive grounds in the DC Circuit are associated with a higher rate at which Congress returns to the delegating legislation so as to better constrain the agency. However, the substantive effect is small, with a standard deviation increase in lawsuit losses associated with a .07-standard deviation increase in the specificity of statutory amendments in the following year, significant at the .05 level. While the impact of these fire alarms by way of successful lawsuits has an apparently only modest impact on congressional amendment activity, there is a more marked substantive effect of the

[9]Inclusion of random effects in lieu of fixed effects performs similarly.

ideological position of the DC Circuit relative to the executive branch, with a standard deviation increase in *executive-judicial distance* associated with a .15-standard deviation decline in the *specificity* of the amendment. This finding is consistent with the expectation that congressional coalitions will be responsive to the likelihood that the DC Circuit might credibly constrain the agency, with greater ideological proximity between the executive and judicial branches potentially reducing the likelihood of finding for the plaintiffs, but greater ideological divergence increasing the court's monitoring potential and thus insulating Congress from the need to engage in more ongoing statutory control. Despite expectations that legislative-executive conflict would shape Congress's propensity to exercise greater ongoing statutory control, neither *divided government* nor *presidential disapproval* are statistically significant, though a greater presence of environmental interest groups appears to be negatively associated with amendment activity. While *presidential election year* is incorrectly signed – with *less* detailed amendment activity in election years – the substantive effect is small and it is significant only at the .10 level.

Models 2 and 3 compare congressional reliance on *only* procedural and enforcement-based amendments (model 2) versus reliance on *only* language detail amendments. While significant only at the .10 level, what is striking is that while the effect of *lawsuit losses* remains positive in model 2, the sign changes in model 3. Thus, while congressional reliance exclusively on the tools of oversight and appropriations appears to mimic the pattern of the overarching *specificity scale*, amid periods of heightened EPA losses in court, Congress's propensity to rely solely on bureaucratic control by way of statutory detail appears to be diminished. However, consistent with model 1, in both cases Congress continues to be responsive to the DC Circuit's likelihood of providing effective oversight of the agency as indicated by their NOMINATE distance. While the effect of *presidential disapproval* is in opposite directions in models 2 and 3, the substantive effects are small in both cases. Becoming a *presidential election year* is associated with a .24-unit increase in *procedural amendments* and a .12-unit increase in *language amendments* per law per year. This is consistent with Farhang & Yaver's (2016) finding

that electoral uncertainty is associated with congressional efforts to fragment authority across multiple implementing actors and institutions so as to guard against drift.[10] While the increased presence of *environmental interest groups* had a negative effect on *statutory specificity* overall, a standard deviation increase in their presence is associated with a .31-standard deviation *increase* in congressional reliance on procedural and enforcement-based amendment strategies, with no statistically significant effect on the passage of *language amendments*.

Curiously, in none of models 1 to 3 is there an effect of *distance between Congresses*. That is, congressional propensity to revise delegating legislation appears not to be driven by the current congressional coalition's proximity to that which last amended the given statute, but rather an ongoing mechanism of congressional control of agencies in response to the partisan configuration in which the agency is operating vis-à-vis Congress and the DC Circuit. Thus, Congress reinserts itself into the lawmaking game in reaction to fire alarms raised or else a changing propensity for the agency to be well-controlled given ideological proximity to the DC Circuit or an impending change in presidential control, and not simply as an artifact of time or proximity to prior congressional coalitions.

The above empirical analysis sheds important new light on congressional passage of different types of statutory control of the EPA, but is limited by its reliance on passed legislation to evaluate the mechanisms prompting Congress to revisit the delegating legislation. That is, in order to enter the sample, each legislative effort to reshape the agency's latitude must survive a number of different veto points: it must be passed by a committee, it must be passed by the floor, it must be reconciled between the chambers, and it must be signed into law by the president. And while a number of legislative proposals may indeed be accurately characterized as "cheap talk" signaling, a number of such efforts are indeed sincere and may garner the support of meaningful coalitions within Congress, providing valuable information as to driving

[10]The effects are consistent when replacing *presidential election year* with the *electoral uncertainty* measure employed by Yaver (2016), which is the share of seats won in the previous election by a margin of 5 percentage points or fewer.

forces underlying efforts to curb agency latitude but with less success in doing so.

To address this, I provide in model 4 an estimation of the *success rate* with which Congress amends the delegating legislation. To capture this, I first conducted searches in THOMAS for each of the EPA delegating statutes for the same 1973 to 2010 time period as that estimated in the statutory amendment data. There was a range of 0 to 174 bills introduced per statute per year, with an average of 14.52 and wide variation in the length of legislative cycles. I then created a ratio of the number of amending statutes to the number of amending bill introductions. While Congress's position relative to the DC Circuit appears highly predictive of the extent to which Congress amends the delegating legislation, model 4 reveals that there does not appear to be an effect of actual *lawsuit losses* or of *executive-DC Circuit distance* on the rate of success that members meet in working to revise these statutes. In fact, the only substantive predictors here are whether it is a *presidential election year* and the volume of *environmental groups*. That congressional coalitions would be better mobilized around amending legislation amid greater interest group pressure, and in the face of a different executive branch, is consistent with the theory that coalitions seek *in ongoing ways* to insulate policy against drift, responding to both the partisan configurations in which they are operating and fire alarms brought by interest groups operating in this terrain. To put these effects in perspective, a move from a non-election year to an election year is associated with a .15-unit increase in Congress's success rate in amending the legislation to some degree. Further, a standard deviation increase in the number of environmental interest groups is associated with a .24-standard deviation increase in the success rate as well. Thus, the increased presence of groups able to pressure Congress to take action in constraining the agency, and the political uncertainty brought about by an election season, both appear to spur not simply certain members to introduce amending legislation, but to pressure the institution to secure its final passage.

Because the use of a fixed effects estimator precludes the inclusion of law-level variables that are time-invariant, as a robustness check I present in Tables 2 and 3 alternative specifications of

the predictors of statutory amendments using instead a random effects estimator. I present in Table 2 models using the same variables as those presented above. While the effect of *lawsuits lost* goes away with respect to *language amendments*, the effect remains positive and significant with respect to *specificity* and *procedural amendments*. This thus bolsters evidence in favor of litigation against the EPA spurring action in Congress, while ideological disagreement between the executive branch and DC Circuit – in theory increasing the likelihood of the court serving as an effective monitor of agency actions – continues to insulate Congress against needing to engage in more ongoing bureaucratic control. Moreover, consistent with the main results presented in Table 1, while the effect of a *presidential election year* is negative and statistically significant at the .10 level when looking to the overall specificity scale, disentangling statutory amendments into *procedural* and *language* amendments again produces positive and statistically significant effects, which is consistent with the theory that an impending change of administration should mobilize Congress to provide for added insulation against drift.

In Table 3, I add the additional variables the *enacting chamber distance* given Maltzman & Shipan's (2008) claim that those laws passed by more ideologically divergent Congresses will prove to be more fragile and subject to amendment, a dummy variable for whether the delegating statute provided for *citizen suits* to expand the pool of potential litigants and monitors of agency actions,[11] and I include policy fixed effects given the heterogeneous nature of environmental policy. The six policy codes that I assigned, based on the main substance of the delegating legislation, are *Air*, *Water*, *Energy*, *Public Land and Animals*, *Public Health and Safety*, and *Toxic Substances*, which is omitted as the base category. Here, the results are virtually unchanged from those discussed above, with the exception of *executive-DC Circuit distance* falling below conventional levels of statistical significance in model 9. Overall, however, this provides greater support for the robustness of the paper's claim that agency losses in

[11]While it typically is the case in the American legal system that one must have been personally injured to have standing to sue, citizen suit provisions allow for *any* individual or organization to sue violators or to sue the Administrator for her action or inaction.

court appear to mobilize greater efforts in the way of statutory control of the agency, as does potential change in control of the executive branch. The effects of *enacting chamber distance* and *citizen suits* are inconsistent and statistically significant only in model 10, such that the inferences that we can draw are quite limited, though the reduced reliance on statutory control in the presence of citizen suit mobilization is consistent with expectations.

Policy Consequences of Statutory Revision

The empirical analysis above provides a rich new understanding of the conditions under which congressional coalitions coalesce around increasing statutory control of the EPA. However, what it does not account for is the extent to which these statutory amendments in fact move the policy location. That is, Congress may add detail to a statute so as to allow the agency less latitude to read between the lines, but that amending coalition may have preferences that are highly aligned with the enacting legislature.

To assess the extent to which these procedural and language amendments result in policy swings to the left (right), I identified the DW-NOMINATE score of the median legislator voting in favor of each of the 2,000 statutory amendments. In the case of voice votes, as with unanimous votes, I used the DW-NOMINATE score of the floor median. In obtaining the coalition ideologies, I rely on the final vote cast by the chamber on the entirety of the bill, whether the conference committee vote to accept all changes or the final floor vote in favor of passage. Utilizing the NOMINATE median of these coalitions is consistent with legislative median-voter theories, which propose that policy outcomes will be consistent with the preferences of the median legislator.[12] Figure 3 plots the amending coalition medians over time for each of the 26 delegating statutes. While there are clearly some similarities across statutes given trends in

[12]Wiseman & Wright (2008) find that the median legislator is "unambiguously closer" to the majority party median than to the minority party median and is predisposed to support the agenda advocated by the majority party, giving one reason to expect that looking to the preferences of the median legislator will be highly informative. However, see Krehbiel (1998).

Democratic (Republican) control of Congress, there is nevertheless considerable variation in the ideological composition of coalitions taking to task different statutes at given points in time, in part in response to these fire alarms through the judiciary.

I then normalized the *specificity scale* to fall between the values of 0 and 1 and treated it as a weight on the *coalition median* to determine to what extent we observe that more liberal (conservative) congressional coalitions are producing statutory changes of greater magnitude and thus to a greater degree constraining executive latitude. Thus, while having statutory amendments by highly varied congressional coalitions over time may create an appearance of marked policy volatility, if those coalitions are barely touching on the statutes, there will be less of a departure from the status quo than in the case of more extensive efforts toward statutory control of the agency. Similarly, while extensive statutory changes may create the appearance of policy volatility, the departure from the status quo policy may be less significant if there is a high level of consistency in the congressional coalitions making those amendments. By combining these measures, one can see both in what direction, and to what extent, policy moved as a consequence of these statutory revisions.

Figure 4 plots this measure over time for each of the delegating statutes. While some statutes (such as the Emergency Planning and Community Right-to-Know Act and the Ocean Dumping Act) demonstrate remarkable consistency over the course of the time series, others (such as the National Environmental Protection Act and the Nuclear Waste Policy Act) display patterns of more isolated shocks consistent with the punctuated equilibrium theory of policy change, while still others (such as the Atomic Energy Act, the Clean Air Act, and the Federal Food, Drug, and Cosmetic Act) illustrate more ongoing ebbs and flows with respect to the policy location. This reaffirms this paper's claims about the importance of looking at within-statute variation in congressional efforts to constrain executive implementation, and the important consequences with respect to policy stability and executive branch latitude as a consequence of these ongoing inter-branch interactions.

Conclusion

The critical relationship between representation and administration strikes at the heart of several decades of scholarship aimed at understanding the conditions leading to congressional delegation, the normative consequences of this allocation of implementation authority, and the ways in which Congress can guard against drift by its administrative agents. Rather than micromanaging the actions of implementing agencies, Congress is able to provide for "fire alarm" oversight whereby others are empowered to monitor and call attention to violations, at which point Congress may intervene if necessary. What scholars had not previously characterized empirically, however, was the extent to which Congress does in fact reenter the lawmaking game to better constrain agencies upon observing such fire alarms.

Providing a rich new dataset on all statutory amendments to the legislation under the jurisdiction of the Environmental Protection Agency from 1973 to 2010, this paper provides a novel assessment of the particular ways in which congressional coalitions exercise statutory control of the agency given conditions of agency losses in the DC Circuit, as well as the DC Circuit's likelihood of providing effective monitoring of the executive branch, and the executive branch's political security. It provides robust support for the claim that in the face of heightened allegations of agency misbehavior, Congress has a greater likelihood of taking to task the delegating legislation so as to reign in executive latitude moving forward. Congress engages in considerably less such statutory control when the DC Circuit and the executive branch are ideologically distant, a condition under which the judiciary should be more willing to intervene in the agency's policy choices and thus relieve Congress from the need to intervene as much itself. While presidential disapproval does not have a consistent or marked effect on statutory amendment activity, congressional coalitions typically appear more inclined toward restricting executive latitude in the face of a change in presidential control so as to insulate against drift. And as a consequence of this ongoing effort toward congressional control of agencies, there is in many cases considerably greater volatility in the resulting policies than scholars have

previously appreciated. Thus, while agencies may indeed demonstrate a willingness to step outside of their discretionary windows – or at least to act in ways that provoke constraining responses from interest groups and courts – it ultimately results in subsequent and ongoing congressional curbing of their implementation capacity.

This paper thus brings to light a number of under-studied features of delegation in American politics. While it is understood that the principal-agent dynamics of bureaucratic control are only imperfect, it reveals in new ways the at times dramatic extent to which courts find agencies to deviate from their statutory directives, and the ways that that bureaucratic behavior reshapes the ways in which Congress manages agencies moving forward. It calls attention to the need to evaluate more closely the effects of the political environment on the dynamics of congressional control at the statute level. Future work will explore the reasons underlying the asymmetric effects of *lawsuit losses* on the congressional choice of procedural versus language specificity amendments, as well as the interest group pressures most successful in producing different types of statutory controls. However, this paper makes important new strides in understanding the reach of congressional responsiveness to fire alarms raised through the judicial system, and thus the nature of representation in statutes as they continue to evolve over time.

Table 1: Congressional Amendments to EPA Legislation

	(1) Specificity	(2) Procedural	(3) Language	(4) Success Rate
Lawsuit Losses	0.303*	0.241†	-0.170†	-0.024
	(0.148)	(0.129)	(0.093)	(0.047)
Executive-DC Circuit Distance	-1.239**	-0.529†	-0.518*	-0.087
	(0.394)	(0.322)	(0.217)	(0.112)
Presidential Disapproval	0.005	-0.009**	0.005*	0.000
	(0.004)	(0.003)	(0.002)	(0.001)
Divided Government	0.082	-0.158*	-0.101*	-0.039
	(0.094)	(0.077)	(0.050)	(0.027)
Presidential Election Year	-0.150†	0.237**	0.122*	0.151**
	(0.088)	(0.072)	(0.053)	(0.026)
Environmental Groups	-0.004*	0.003*	0.001	0.002**
	(0.002)	(0.001)	(0.001)	(0.000)
Distance Between Congresses	0.349	-0.113	-0.292	-0.213
	(0.472)	(0.386)	(0.263)	(0.135)
Years Since Enactment	0.066†	-0.061*	-0.029	-0.045**
	(0.037)	(0.030)	(0.020)	(0.010)
Intercept	3.297**	0.081*	0.286	-0.198
	(0.398)	(0.326)	(0.242)	(0.119)
R^2	0.25	0.05	0.05	0.11
N	748	748	748	748

$^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table 2: Congressional Amendments to EPA Legislation Using Random Effects

	(5) Specificity	(6) Procedural Amends	(7) Language Amends
Lawsuit Losses	0.300†	0.265*	-0.138
	(0.159)	(0.128)	(0.091)
Executive-DC Circuit Distance	-1.219**	-0.458†	-0.472*
	(0.394)	(0.256)	(0.211)
Presidential Disapproval	0.006	-0.010**	0.005*
	(0.004)	(0.003)	(0.002)
Divided Government	0.074	-0.102	-0.076
	(0.091)	(0.073)	(0.049)
Presidential Election Year	-0.155†	0.260**	0.131**
	(0.086)	(0.069)	(0.051)
Environmental Groups	-0.003**	0.000	-0.000
	(0.000)	(0.000))	(0.000)
Distance Between Congresses	0.213	-0.411	-0.461†
	(0.454)	(0.366)	(0.245)
Years Since Enactment	0.053**	0.000	0.003
	(0.015)	(0.014)	(0.007)
Intercept	3.089**	1.282***	0.546*
	(0.425)	(0.358)	(0.219)
R^2	0.17	0.11	0.06
N	748	748	748

$^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Table 3: Congressional Amendments to EPA Legislation Using Random Effects

	(8) Specificity	(9) Procedural Amends	(10) Language Amends
Lawsuit Losses	0.311*	0.367*	-0.153†
	(0.158)	(0.128)	(0.091)
Executive-DC Circuit Distance	-1.198**	-0.441	-0.506*
	(0.395)	0.317)	(0.209)
Presidential Disapproval	0.006	-0.010**	0.005**
	(0.004)	(0.003)	(0.002)
Divided Government	0.083	-0.092	-0.086†
	(0.092)	(0.074)	(0.049)
Presidential Election Year	-0.150†	0.268**	0.121*
	(0.087)	(0.070)	(0.051)
Environmental Groups	-0.004**	-0.000	0.000
	(0.000)	(0.001)	(0.000)
Distance Between Congresses	0.137	-0.467	-0.394
	(0.457)	(0.370)	(0.243)
Years Since Enactment	0.061**	0.011	-0.009
	(0.019)	(0.018)	(0.008)
Enacting Chamber Distance	1.456	1.344	-2.187*
	(1.877)	(1.727)	(0.882)
Citizen Suits	0.369	-0.051	-0.204†
	(0.271)	(0.291)	(0.115)
Air	0.036	-0.288	0.598*
	(0.673)	(0.715)	(0.288)
Energy	0.530	-0.132	0.201
	(0.361)	(0.380)	(0.155)
Water	-0.459	-0.109	0.117
	(0.353)	(0.382)	(0.148)
Public Land & Animals	-0.538	0.022	0.546**
	(0.393)	(0.426)	(0.165)
Public Health & Safety	0.153	-0.372	0.223
	(0.392)	(0.409)	(0.170)
Intercept	2.980**	1.425**	0.494*
	(0.473)	(0.424)	(0.232)
R^2	0.41	0.05	0.23
N	748	748	748

$^{**}p < .01, ^{*}p < .05, ^{\dagger}p < .10$

Figure 1: Amendments to the Clean Air Act Over Time

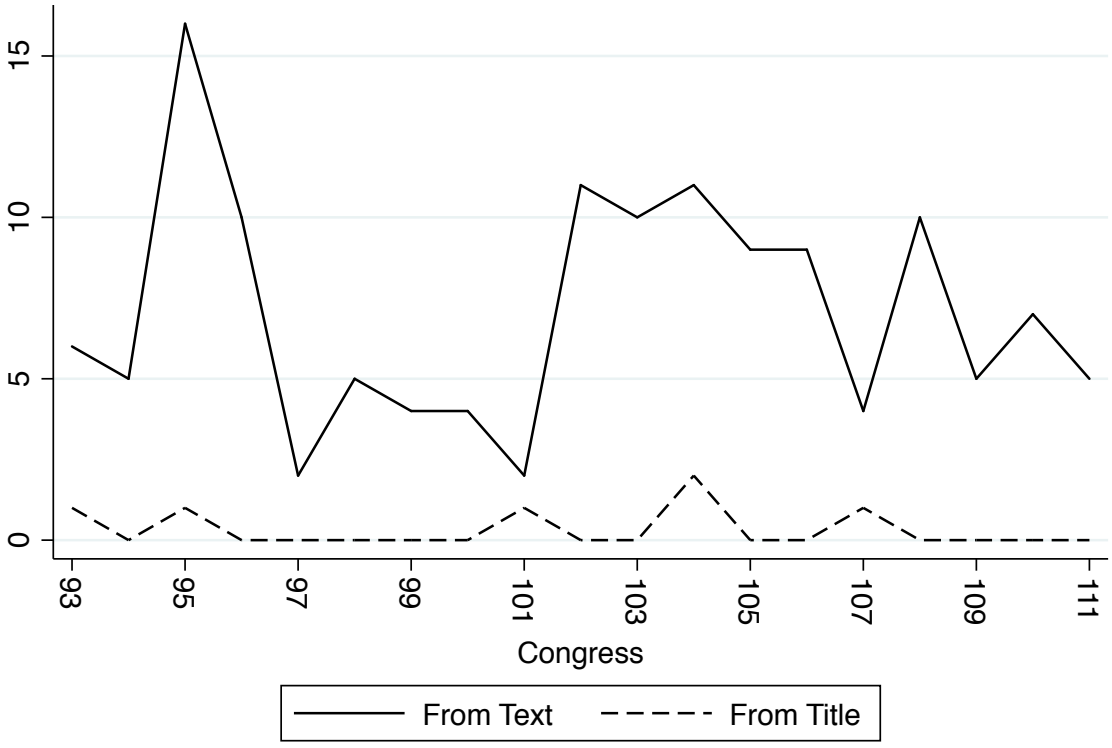


Figure 2: Frequency of Statutory Amendments by Type

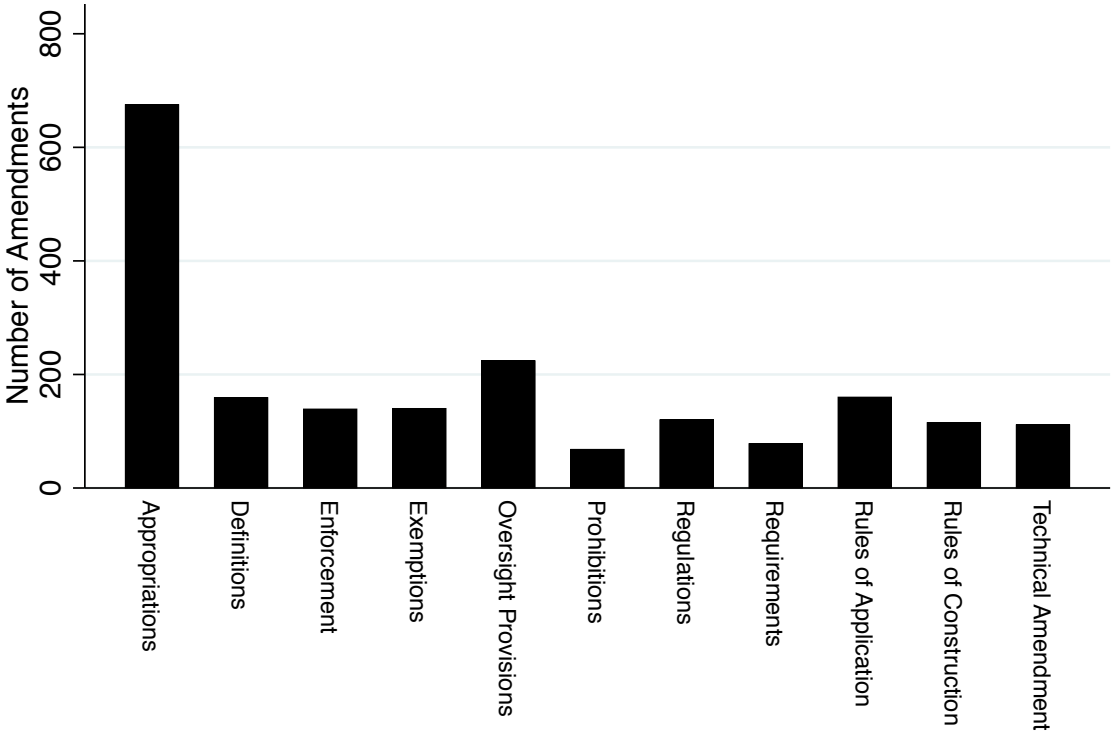


Figure 3: Amending Coalitions Over Time

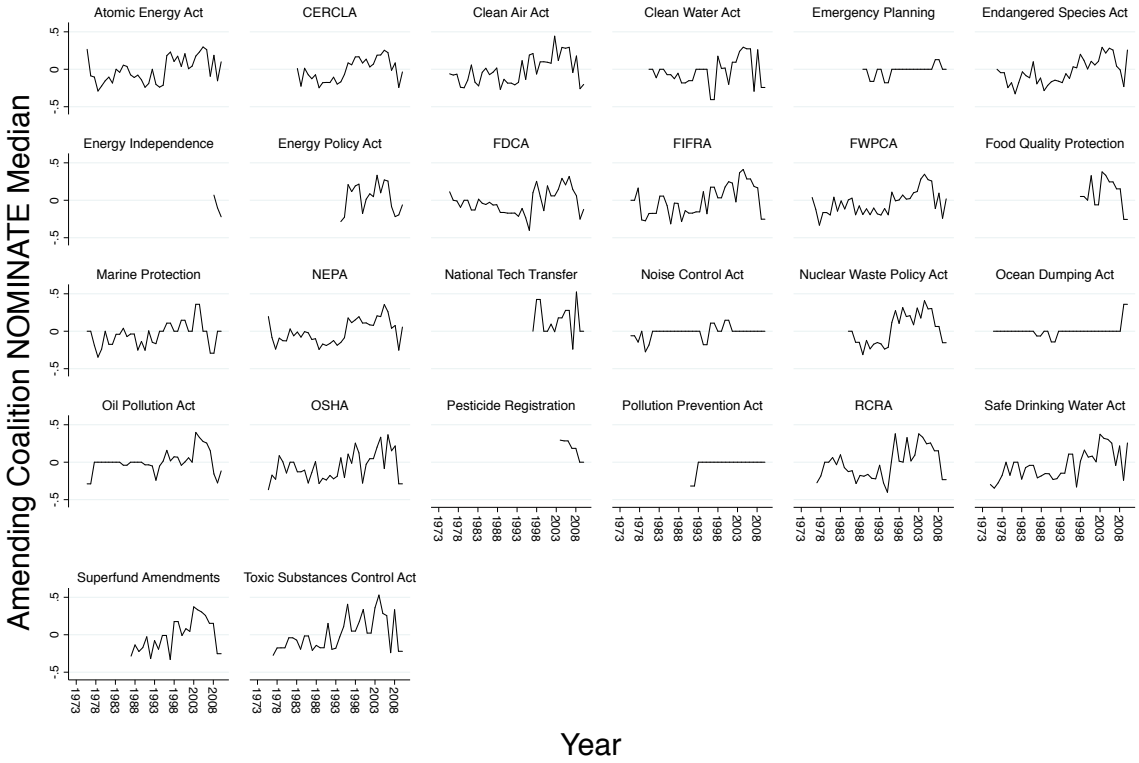
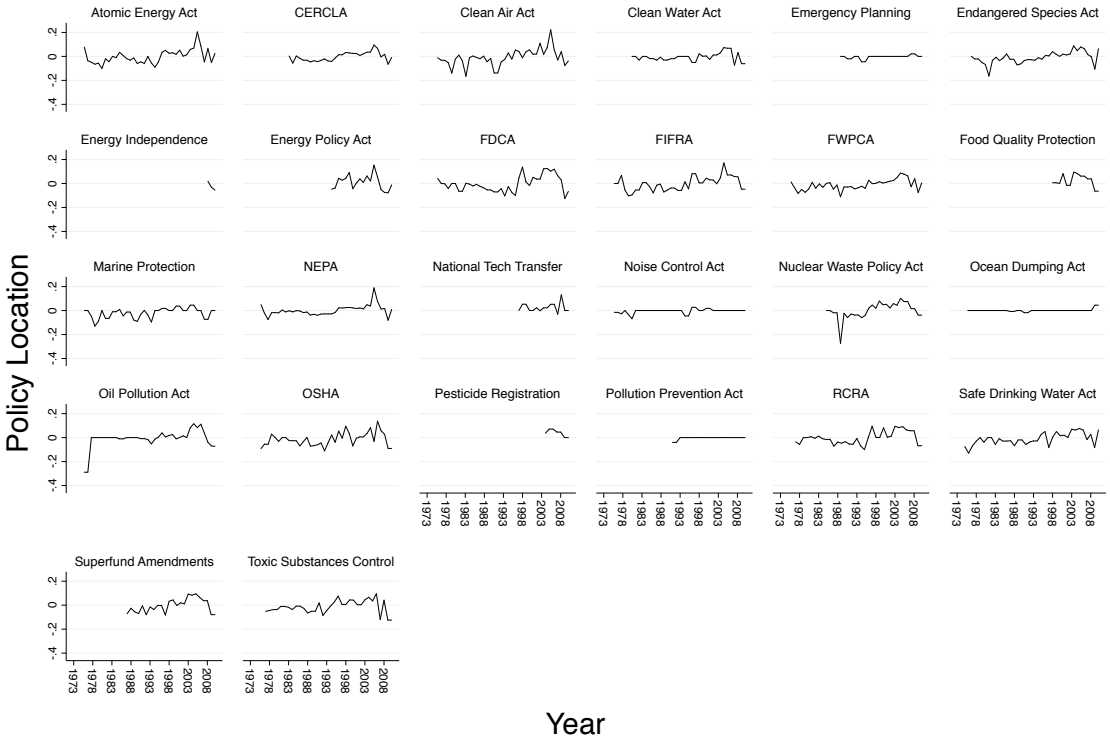


Figure 4: Policy Location Over Time



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