LEGISLATIVE ALLOCATION OF DELEGATED POWER: UNCERTAINTY, RISK, AND THE CHOICE BETWEEN AGENCIES AND COURTS

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Matthew C. Stephenson[*]

When a legislature delegates the authority to interpret and implement a general statutory scheme, the legislature must choose the institution to which it will delegate this power. Perhaps the most basic decision a legislature makes in this regard is whether to delegate primary interpretive authority to an administrative agency or to the judiciary. Understanding the conditions under which a rational legislator would prefer delegation to agencies rather than courts, and vice versa, has important implications for both the positive study of legislative behavior and the normative evaluation of legal doctrine; the factors that influence this choice, however, are not well understood. This Article addresses this issue by formally modeling the decision calculus of a rational, risk-averse legislator who must choose between delegation to an agency and delegation to a court. The model emphasizes an institutional difference between agencies and courts that the extant literature has generally neglected: agency decisions tend to be ideologically consistent across issues but variable over time, while court decisions tend to be ideologically heterogeneous across issues but stable over time. For the legislator, then, delegation to agencies purchases intertemporal risk diversification and interissue consistency at the price of intertemporal inconsistency and a lack of risk diversification across issues, while delegation to courts involves the opposite tradeoff. From this basic insight, the model derives comparative predictions regarding the conditions under which rational legislators would prefer delegating to agencies or to courts.

The question, "Why do legislators delegate?" and the closely related question, "Why do legislators draft ambiguous statutes?" are the subject of a rich literature. Suggested explanations include the need to leave technical questions to experts,[1] politicians' desire to duck blame

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[1] For the classic statement of this justification, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938). For more recent versions of the argument, developed using the tools of modern positive political science, see Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004); and David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 106–12 (2000). While the expertise justification is most often associated with delegation to agencies, some scholars have also suggested that legislative delegation to the judiciary can be explained by courts' superior factfinding abilities. *See* James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84 (2001); *see also* Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004).

for unpopular choices[2] or to create new opportunities for constituency service,[3] the inability of multimember legislatures to reach stable consensus,[4] and the impossibility (or excessive cost) of anticipating and resolving all relevant implementation issues in advance.[5] Whatever the reason for delegation, the end result is that legislators who choose to delegate — whether explicitly or via statutory ambiguity — cannot predict with certainty how the decisionmaker charged with implementation will interpret the statute they enact. Such legislators have therefore entered what is sometimes referred to as a policy "lottery."[6]

This Article addresses a closely related but distinct question: given that legislators have an interest in delegation, *to whom* do they prefer to delegate? After all, even legislators who decide to enter a policy lottery still have some ability to determine which policy lottery they enter by specifying which decisionmaker has primary authority to interpret the statute's commands. Perhaps the most basic decision a legislator may make in this regard is whether to delegate to an administrative agency or to the judiciary. The conditions under which a rational legislator would prefer delegation to agencies rather than courts has im-

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[2] On how legislators avoid blame or claim credit by delegating to courts, see Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 104 (2000); and Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 361–66 (1993). On how legislators avoid blame or claim credit by delegating to agencies, see Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–62 (1982); and Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982).

[3] On the usefulness of agency delegations in creating new opportunities for constituency service, see MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 43–46, 67 (2d ed. 1989); and Fiorina, *supra* note 2, at 53.

[4] Commentators have invoked the instability of collective legislative choice to explain both delegation to agencies, *see* David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 432 (2002), and delegation to courts, *see* Salzberger, *supra* note 2, at 366–68.

[5] *See* Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983).

[6] The lottery metaphor captures the idea that the ultimate policy outcome of legislation is uncertain and that the legislator has at least a rough sense of the odds of the different policy outcomes that may result. From the legislator's perspective, then, the statute can be characterized as a probability distribution over policy outcomes, and this probability distribution has a mean, a variance, and a particular shape. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 31 (1999); Aranson et al., *supra* note 2, at 7, 60–61; Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 38 (1986); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 88, 90, 92 (1985); Daniel R. Ortiz, *The Self-Limitation of Legislative History: An Intrainstitutional Perspective*, 12 INT'L REV. L. & ECON. 232 (1992); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218 (1992).

portant implications for both the positive study of legislative behavior and the normative evaluation of legal doctrine. The factors that influence this choice, however, are not well understood.

In this Article, I consider a subset of the factors that might influence whether a rational legislator would prefer to delegate the authority to interpret an ambiguous statute to an administrative agency or to a court. In particular, I focus on the relative variability of agency and judicial interpretive decisions, both across time and across discrete issues. I argue that interpretive consistency, from the perspective of a rational legislator, entails both benefits and costs. On the one hand, consistency may be intrinsically valuable, independent of the desirability of the particular policies implemented, if inconsistency creates undesirable inefficiencies. On the other hand, inconsistency — that is, variation in the ideological complexion of outcomes across time or across issues — can diversify political risk, which is valuable to legislators if they or their constituents are risk averse.

I argue further that legislators confront the tradeoff between efficient interpretive consistency and risk diversification along two dimensions: across issues and over time. This fact is relevant to the legislative choice between delegation to agencies and delegation to courts because of an institutional difference between agencies and courts that has often been noted in passing but rarely considered in systematic fashion. As a rough generalization, agency interpretive decisions tend to be ideologically consistent across issues but variable over time, while judicial interpretations tend to be ideologically heterogeneous across issues but stable over time. Therefore, from the perspective of a rational legislator, delegating primary interpretive authority to an administrative agency achieves intertemporal risk diversification and interissue consistency, while delegating to a court achieves interissue risk diversification and intertemporal consistency.

This hypothesis, if correct, has both positive and normative implications. On the positive side, it may help explain and predict situations in which legislatures will delegate power to agencies or to courts — though of course this factor would be only one among many, and actual empirical testing might pose substantial challenges. The hypothesized tradeoffs may also shed light on broader trends in American public law and on other aspects of congressional influence over agency and court decisionmaking. Alternatively, it may be that excessive legislative transaction costs or imperfect information prevent the factors stressed by my hypothesis from substantially affecting actual legislative decisionmaking. If this is the case, then my hypothesis might predict how legislative behavior could change if transaction costs were lowered or legislative information were improved.

On the normative side, understanding how the factors discussed in this Article might affect rational legislative preferences may have implications for debates about whether the current American legal and

political system delegates too much or too little to administrative agencies, and about how judicial doctrine ought to respond. While I do not engage these normative questions directly, I contribute to these debates by providing further positive analysis of a factor that is, or ought to be, a relevant consideration.

The Article proceeds as follows. Part I surveys the existing literature on the legislative choice between agency and judicial interpretation of statutory provisions. Part II analyzes the legislator's decision using the formal modeling techniques of positive political theory. This formalization serves to make the assumptions of my analysis more explicit, to derive the major hypotheses, and to provide a foundation for further refinement and development of the basic decision problem I explore in this Article. Understanding the technical aspects of the formal analysis, however, is not necessary to understand the Article's main arguments, and readers with less interest in the formal analysis and derivation of comparative static hypotheses may wish to skim Part II. Part III discusses some of the substantive implications of my results. I consider how, in light of the theory developed in this Article, legislative preference for interpretation by agencies or courts might be influenced by the nature of the regulatory problem, the salient characteristics of legislators and their constituents, other political and institutional characteristics of agencies and courts, and administrative law doctrine.

I. THE PUZZLE AND THE EXTANT LITERATURE

The legislative choice between agencies and courts has occasionally been the subject of overt and vigorous congressional deliberation. For example, one of the most important points of contention in debates over the Interstate Commerce Act of 1887[7] was whether the Act should be enforced by the courts or by a commission.[8] Likewise, the debates that preceded enactment of the 1946 Administrative Procedure Act[9] (APA) centered around the question of how to allocate decisionmaking power between agencies and courts.[10] Subsequent proposals to amend the APA focused more specifically on how much deference courts should accord agency interpretations of statutes.[11]

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[7] ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

[8] *See* Fiorina, *supra* note 6, at 33–38; Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 47–49 (1989).

[9] ch. 324, 60 Stat. 247.

[10] *See* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180–83, 189–95 (1999); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

[11] The so-called "Bumpers Amendment" would have amended the APA to require courts to decide all relevant questions of law de novo, without deference to agency interpretations. *See*

In many other cases, even though Congress did not explicitly debate the relative virtues of agency and judicial interpretation, it nonetheless made a relatively clear choice between these options. Numerous statutes expressly confer on agencies the power to enact regulations to flesh out statutory mandates,[12] while in other statutes, Congress expresses an implicit preference for judicial interpretation by declining to entrust enforcement authority to any particular agency[13] or, perhaps, by assigning responsibility to several agencies.[14]

Even when legislators have not clearly considered the choice between agencies and courts, a number of key administrative law doctrines are premised on assumptions about which option the legislators implicitly chose, or would have chosen if they had considered the ques-

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Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473–74 (1989); Ronald M. Levin, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355. On a few occasions, Congress has also effected more specific transfers of interpretive authority from agencies to courts. Examples include the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2000), and the preemption clause of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6714(e) (2000).

[12] For example, the Securities Exchange Act of 1934 grants the SEC the power to issue "such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors," 15 U.S.C § 78j(b) (2000), and the Communications Act of 1934 similarly authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Act, 47 U.S.C. § 201(b) (2000). In cases in which Congress wants a general statute to be implemented via specific, detailed regulations, it may have no choice but to delegate to agencies, as courts are, for the most part, institutionally incapable of establishing regulations of this kind. Therefore, delegation to agencies of the authority to promulgate implementing regulations may sometimes reflect not a preference for agencies over courts per se but rather a preference for a certain type of regulation. I thank Professor David Barron for suggesting this argument.

[13] One example is the Sherman Antitrust Act. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history [of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."); *see also* Spence & Cross, *supra* note 1, at 139 ("Congress did not create and delegate interpretive authority to any agency. It therefore left to the courts the task of defining the applications of the Sherman Act . . . ."). The Fair Labor Standards Act is another example. *See* Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942) ("In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the interstate Commerce Act and National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations."); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944) ("Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the [Fair Labor Standards] Act. Instead, it put this responsibility on the courts.").

[14] *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252 (D.C. Cir. 2003) (citing cases in which courts interpreted "generic statutes that appl[ied] to dozens of agencies, and for which no agency [could] claim particular expertise").

tion and put it to a vote.[15] Most notably, *Chevron* doctrine,[16] which holds that courts must defer to reasonable agency interpretations of ambiguous statutes, presumes that statutory ambiguity reflects a legislative intent to delegate to the agency charged with administering the statute.[17] Similarly, exclusion of certain interpretive questions from *Chevron*'s domain[18] is often justified by the claim that legislators did not or would not want agencies to have interpretive authority over those questions.[19] A better understanding of legislative preferences is therefore relevant to an assessment of *Chevron* and its exceptions.[20] Legislative preferences regarding the allocation of interpretive authority may also be relevant to judicial enforcement (or nonenforcement) of the nondelegation doctrine, as rigorous enforcement of this doctrine effectively transfers considerable interpretive power from agencies to courts.[21]

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[15] Some scholars have suggested that Congress or the courts should adopt institutional reforms that would remove obstacles to congressional provision of more explicit instructions regarding the allocation of interpretive power. *See, e.g.*, Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003).

[16] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[17] *Id.* at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[18] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

[19] *See* United States v. Mead Corp., 533 U.S. 218, 229–31 (2001) (holding that *Chevron* deference applies only when formal procedures or other circumstances indicate that Congress intended to give agencies the power to issue decisions with the force of law); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33, 159–61 (2000) (purporting to apply *Chevron*, but inferring from context and past practice that Congress could not have intended to give the FDA the power to regulate tobacco products).

[20] *See* Merrill & Hickman, *supra* note 18, at 872 ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."). The Supreme Court has endorsed this view, at least in principle. *See Mead*, 533 U.S. at 230 n.11 (quoting Merrill & Hickman, *supra* note 18, at 872). Even if the presumption of congressional intent is entirely fictitious, understanding what an informed, rational legislator's preferences would be, and why, is useful in designing default rules intended either to mimic informed legislative preferences or to elicit a legislative reaction. *Cf.* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

[21] *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 775 (1999) (arguing that a revived nondelegation doctrine would "radically increase judicial power over vast areas of American life"); Spence & Cross, *supra* note 1, at 139–40. It is worth noting, however, that proponents of a revived nondelegation doctrine, unlike most proponents of the *Chevron* doctrine, do not attach substantial normative weight to what legislators want (or would want if asked). Indeed, nondelegation proponents often argue that the doctrine is valuable precisely because it counters what is perceived as an undesirable legislative preference for passing the buck. *See, e.g.*, Aranson et al., *supra* note 2, at 63–64.

Despite the extensive positive literature on legislative delegation[22] and the voluminous normative literature on how courts should allocate interpretive authority between themselves and administrative agencies,[23] there has been relatively little positive analysis of the factors that would influence legislative preferences between delegating to agencies and delegating to courts. Nevertheless, some important work has addressed this issue. This literature emphasizes four factors: (1) the relative expertise of the potential interpreters (agencies and courts); (2) the preference divergence (or "slack") between the legislator and these potential interpreters; (3) the opportunities for manipulating voters' attribution of credit and blame for policy outcomes; and (4) the relative variation and uncertainty associated with agency decisions and court decisions.

This Article focuses on the fourth factor, which has received less attention than the other three. I briefly discuss the expertise, slack, and credit/blame manipulation hypotheses to provide context. I then turn to a more extensive discussion of the most influential uncertainty-management hypotheses. I wish to make clear at the outset that I do not view these various hypotheses as mutually exclusive, and I am agnostic as to their relative significance. My focus on variance and uncertainty in this Article is meant as an incremental contribution to a larger research agenda that takes all these factors into account.

Expertise. Perhaps the most common explanation for why a legislator would prefer delegation to an agency rather than a court is that agencies have specialized expertise and better access to relevant information, and they are therefore more likely to "get it right" than courts.[24] Agencies, of course, do not have superior information on all interpretive issues. On many questions of law or procedure, for exam-

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[22] *See* sources cited *supra* notes 1–6.

[23] Examples of prominent contributions to this literature include David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990); and Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522.

[24] *See* LANDIS, *supra* note 1, at 22–26. The Supreme Court frequently cites expertise as a justification for presuming congressional preference for agency resolution of statutory ambiguities. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984). A variant on this expertise factor is the relative speed with which agencies and courts are capable of gathering the necessary information and making decisions.

ple, courts are arguably more expert,[25] and agencies often fail to live up to their "expert" billing even on technical issues.[26] Furthermore, though information is certainly important, many decisions ultimately come down to value choices. Thus, expertise is at best a partial explanation for the alleged legislative preference for agencies over courts, and in some contexts this factor might support a preference for courts over agencies.

Slack minimization. The basic principal-agent dilemma, of which legislative delegation is a subspecies, involves a tradeoff between the principal's desire to exploit the agent's informational advantages and the principal's concern that the agent will pursue divergent goals.[27] Whereas "expertise" explanations of delegative choice emphasize the first half of this equation, "slack minimization" explanations stress the legislator's desire to reduce the divergence between her own preferences and those of her agent. In its simplest form, the slack-minimization view suggests that legislators prefer delegation to an agency rather than a court when the ideological distance between legislator and agency is smaller than that between legislator and court.[28]

Some slack-minimization theories also emphasize institutional differences between agencies and courts. For example, because courts are more politically insulated than agencies, they may be less susceptible to ongoing congressional influence.[29] While this observation suggests that legislators would prefer delegation to agencies, over which they have more control, such a conclusion is problematic. Agencies are also susceptible to influence by the President, and the President's influence over agency decisionmaking is almost certainly greater than Con-

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[25] *See* Bernard W. Bell, *Using Statutory Interpretation To Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 143–44 (1997); Breyer, *supra* note 23, at 397.

[26] *See* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1088–99 (1990).

[27] *See generally* J. Bendor et al., *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235 (2001). Monitoring expenses are also sometimes cited as a distinct cost associated with principal-agent problems, but in my view, monitoring costs are merely derivative of the slack problem.

[28] Professor Jonathan Bendor and his collaborators refer to this general idea as the "ally principle." *See* Bendor & Meirowitz, *supra* note 1, at 300; Bendor et al., *supra* note 27, at 243. For an application of the ally principle in the context of the choice between agencies and courts (albeit one that involves a choice by the Supreme Court rather than Congress), see Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996). *But see* Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657 (2004).

[29] *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 887–88 (1975). Another possible set of institutional factors that influence the amount of slack may be the different selection criteria for judges and administrators.

gress's.[30] Legislators might also fear that the preferences of future legislatures will diverge from their own.[31] A legislator who anticipates ideological divisions with the President or future legislators might therefore prefer delegation to courts.[32] Slack-minimization considerations thus entail complex tradeoffs and do not clearly favor agencies or courts as a general matter.

Attribution of credit and blame. If voters are imperfectly informed or imperfectly rational, a legislator has an incentive to choose a delegation strategy that maximizes her ability to avoid blame for unpopular policies and to claim credit for popular ones. Legislators may therefore delegate controversial "no win" decisions, in which any outcome will anger some important constituency.[33] This "blame deflection" argument has been used to explain both delegation to agencies and delegation to courts.[34] One might imagine, given the greater political insulation of the judiciary, that legislators interested in blame avoidance would prefer delegation to courts because legislators may appear to have even less responsibility for judicial decisions than for agency decisions. This is not necessarily the case, however, if the legislator and the President are ideological adversaries and the President is seen by voters as more responsible for agency decisions.

An alternative hypothesis posits that, if voters are more likely to reward legislators for fixing problems than for avoiding them, legislators have an incentive to delegate to agencies, wait for the agencies to create messes, and then clean up the messes by intervening on con-

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[30] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987) (arguing that congressional control over the bureaucracy has been overstated relative to the influence of the President); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 11–20, 37–42.

[31] This is sometimes referred to as the problem of "legislative drift." *See* Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503–04 (1989).

[32] *Cf.* Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 277–79 (John E. Chubb & Paul E. Peterson eds., 1989) (discussing reasons why legislators may not wish to retain general policy control over agencies); Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321 (2002) (discussing elected officials' potential desire to insulate bureaus from future change due to uncertainty about future political developments); Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (recognizing independent judicial review as a mechanism used by the legislative and executive branches to impose mutual restraint).

[33] *See* John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 245–46 & n.57 (1990); Fiorina, *supra* note 2, at 46–52. *But see* Stephenson, *supra* note 1, at 393–94 (noting limits to the blame deflection hypothesis and suggesting an alternative rationalist explanation for behavior patterns associated with blame deflection).

[34] *See* sources cited *supra* note 2.

stituents' behalf.[35] This suggests a legislative preference for delegation to agencies, as it is harder for legislators to "fix" a judicial decision than to pressure an administrative agency.

Variance and uncertainty. Legislators may care not only about the *expected values* of the policy lotteries represented by delegation to agencies and delegation to courts, but also about the *variance* of those lotteries. The concern with variance arises for two reasons. First, legislators care about variance if they (or their constituents, who exert influence on legislative behavior) are risk averse. Second, legislators or their constituents may value interpretive consistency if, for example, substantial adjustment costs make adherence to a suboptimal rule preferable to allowing frequent revisions,[36] or if significant problems are associated with uncoordinated regulatory policies.[37]

The role of uncertainty in the legislative choice between agencies and courts has received less attention than other dimensions of this choice. The most important prior work on this factor — and the work to which this Article owes the greatest intellectual debt — is the analysis provided by Professor Morris Fiorina.[38] In his seminal article on legislative choice between legal process and administrative process, Professor Fiorina recognized that because "implementation of a regulatory decision is itself a highly uncertain process,"[39] a legislator's attitude toward risk coupled with the shape of the relevant probability distributions over outcomes affects her choice between administrative and judicial implementation of regulatory statutes.[40] Professor Fiorina's preliminary analysis of the impact of uncertainty was problematic in two respects, however. First, while he treated delegation to an agency as a lottery, he treated delegation to courts as yielding a

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[35] *See* sources cited *supra* note 3. One reason it may be easier for legislators to claim credit for fixing problems ex post is that legislation is a collectively supplied good, and the contribution of any individual legislator is difficult to ascertain. In contrast, it is very easy for constituents to observe the contribution of their legislator to ex post interventions on their behalf.

[36] In addition to switching costs, lack of intertemporal stability can also induce a time-consistency problem. *See* Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

[37] *Cf.* RONALD DWORKIN, LAW'S EMPIRE 178–86 (1986) (critiquing "checkerboard" legislation); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1029–30 (2000) (discussing the problem of "agency disruption," in which ad hoc administrative law decisions on single issues disrupt the other proceedings of an agency). Professor Dworkin, however, assumes — contrary to the assumption I make in this Article — that courts have an institutional advantage over agencies in ensuring coherence and integrity across statutes and statutory provisions.

[38] Fiorina, *supra* note 2; Fiorina, *supra* note 6. Professor Fiorina offered an array of possible explanations for legislative choice between delegation to agencies and delegation to courts, including most of the expertise, slack, and blame/credit manipulation arguments summarized above. Indeed, much of the subsequent literature on these explanations builds on his insights.

[39] Fiorina, *supra* note 2, at 55.

[40] *Id.* at 55–60.

definite result.[41] Second, his substantive conclusions regarding the effects of uncertainty on legislative preferences depended critically on the unconventional assumption of a bell-shaped legislative utility function, in which the legislator is risk averse if the expected outcome is close to her ideal point, but risk acceptant if it is far away.[42] Critics immediately pointed out that this assumption is nonstandard and hard to justify on substantive grounds.[43]

In a subsequent article, Professor Fiorina allowed delegation to courts to entail uncertainty and abandoned the notion of bell-shaped utility functions.[44] At the same time, though, he adopted other nonstandard and controversial assumptions. First, he assumed that legislator utility functions are asymmetric: while each legislator is always risk averse, she is *more* risk averse if the expected outcome is to the left of her ideal point than if it is to the right (or vice versa).[45] Second, he restricted the probability density function of judicial decisions to be symmetric about the median legislator's ideal point and restricted the probability density function of agency decisions to be strictly increasing or decreasing, with an expected outcome unequal to the median legislator's ideal point.[46] These assumptions limit the generality of Professor Fiorina's analysis. Additionally, in contrast to his earlier article, Professor Fiorina's two main results in the later article have little to do with uncertainty as such. His main conclusions are that "we will find the most solid opposition to and the most solid support for administrative regulation among those relatively far from the median" and that "[l]egislators far from the median who foresee a pattern of agency enforcement to their liking will favor administrative regulation more than their opposites who regard that pattern as unfavorable."[47] Both of these conclusions flow from the assumptions that the expected value of judicial regulation is the median legislator's ideal point and the expected value of administrative regulation is biased away from the median. The heavy lifting in Professor Fiorina's model is done by differences in means; uncertainty matters only inasmuch as it explains why some legislators close to the median might prefer judicial enforcement even when the agency tilts in their direction.

These criticisms notwithstanding, Professor Fiorina's general framework and preliminary insights provide the foundation on which

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[41] Professor Fiorina acknowledged that the latter assumption was unrealistic and that subsequent work should also treat delegation to courts as a lottery. *Id.* at 60.

[42] *Id.* at 57.

[43] Albert Nichols, *Legislative Choice of Regulatory Forms: A Comment on Fiorina*, 39 PUB. CHOICE 67, 67 (1982).

[44] Fiorina, *supra* note 6, at 39.

[45] *Id.*

[46] *Id.* at 39–40.

[47] *Id.* at 44–45.

to develop further a theory of rational legislative choice between agencies and courts. This Article contributes to that development, extending and modifying Professor Fiorina's framework in three ways. First, I do not impose any particular restrictions on the shapes of the outcome distributions for agency and court policy lotteries. In that sense, my results are more general.[48] Second, instead of considering only a one-issue, one-time decision, I assume legislative delegations entail the resolution of many issues and that these issues continue to be relevant in future time periods. This assumption is a more realistic representation of the legislative choice than the one-issue, one-shot decision that Professor Fiorina models. Third, and most important, I incorporate a key institutional difference between courts and agencies: judicial interpretations of statutes are more stable over time than administrative agency interpretations, while administrative agencies are more likely than courts to treat different interpretive questions in an ideologically consistent manner within a given time period.

This institutional difference arises for a few reasons. First, courts are obliged in most circumstances to adhere to precedents established in earlier cases, and this stare decisis principle is "super-strong"[49] in statutory interpretation cases.[50] This constraint, however, does not apply to administrative agencies, which can and do change their interpretations in response not only to new information but also to changes in the administration's political and regulatory priorities.[51] Second,

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[48] I do, however, impose a number of functional form restrictions that may strike some readers as implausible or unduly restrictive. Part II, which lays out the assumptions of my formal model, highlights several of these restrictions, which could (and probably should) be relaxed in future work.

[49] William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

[50] *See* Neal v. United States, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis* . . . ."); Flood v. Kuhn, 407 U.S. 258, 282 (1972) (invoking stare decisis to uphold the "aberration" of Major League Baseball's antitrust exemption); *see also* Eskridge, *supra* note 49; Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989). The statutory stare decisis principle may be super-strong, but it is clearly not absolute. Professor William Eskridge reports that between 1961 and 1987, the Supreme Court overruled or "materially modified" statutory precedents eighty-five times (an average of just over three times per year). Eskridge, *supra* note 49, at 1363, 1427–39. Of these eighty-five cases, however, thirty-five did not overturn a statutory precedent, but rather "disavowed 'significant reasoning'" in a prior statutory precedent. *Id.* at 1435–39. Though rejection of prior reasoning is obviously important to the development of the law, it is not relevant to the specific assumption made in this Article — that judicial resolutions of specific statutory ambiguities tend to be stable over time. If we exclude from Professor Eskridge's count those cases in which the reasoning of a prior precedent was rejected, but the precedent itself remained good law, we have fifty statutory precedents overturned by the Supreme Court in a twenty-seven-year period — slightly less than two per year. This seems like a relatively low rate, though of course this measure does not take into account overruling of statutory precedents at the Court of Appeals level.

[51] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 186–87 (1991); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly

the President has at his disposal an array of mechanisms to assert centralized ideological control over the bureaucracy, including appointment and dismissal powers, regulatory review, and directive authority.[52] Courts tend to be more ideologically diverse and less subject to centralized control,[53] and judges are (usually) less partisan and outcome-driven in their interpretations of statutes than politically accountable agency heads.

The claim that judicial decisions are less consistent across issues but more consistent across time than agency decisions is, of course, a simplification. Courts do overrule statutory precedents,[54] and judges are subject to some centralized ideological control by the Supreme

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carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."); Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed . . . to adapt their rules and practices to the Nation's needs . . . ."). *But see* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983). The frequency with which agencies revise their interpretations of statutory mandates — and in particular the frequency with which such changes reflect changed political priorities — is an empirical question on which I am unaware of any conclusive data. Certainly, many scholars believe that there will be frequent across-the-board agency revision of statutory interpretations, at least if the judiciary defers to agency interpretations. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 312 (1986) ("After *Chevron*, agencies may depart more easily from their predecessors' interpretations. By orchestrating a number of changes in statutory interpretations by different agencies, an incoming administration will be better able to recast the regulatory system in its own image."); *see also* Sarah Slack, *When Is a Pesticide Not a Pollutant? Never: An Analysis of the EPA's Misguided Guidance*, 90 IOWA L. REV. 1241, 1250 (2005) ("As with many administrative agencies, the policies and statutory interpretations that the EPA has authority to enforce often change from administration to administration."); D.R. van der Vaart & John C. Evans, *Compliance Under Title V: Yes, No, or I Don't Know?*, 21 VA. ENVTL. L.J. 1, 45 (2002) (claiming "it is not uncommon for a new administration to change an agency's interpretation of a statute"). Quantitative verification of this claim is hard to come by, though there is some suggestive evidence in support. *See* David M. Gossett, Chevron*, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 696 n.69 (1997) (finding that in a single year, 1995, federal appellate courts decided twenty-four cases involving a revised agency interpretation of a statute, which suggests that such revisions are not uncommon); *cf.* Eskridge, *supra* note 49, at 1363, 1427–39 (presenting evidence indicating that the Supreme Court revises its interpretations of statutes at a rate of under two per year, suggesting that the rate of agency interpretive revision implied by Gossett's count is high relative to the rate of judicial interpretive revision).

[52] *See* sources cited *supra* note 30.

[53] *See* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641 (1995) (observing that, because "the Supreme Court has limited resources," it "cannot grant a hearing to every loser in a lower court"); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1124–25 (1995) (noting that, because of heterogeneous judicial preferences, a judicial approach to statutory interpretation that is not deferential to the agency's interpretation will lead to "a plethora of inconsistent judicial decisions"); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105 (1987) (noting that the "infrequency of Supreme Court review" permits the "balkanization of federal law").

[54] *See* Eskridge, *supra* note 49, at 1363, 1427–39.

Court.[55] Agency decisions, especially those on less visible and more technical issues, may exhibit a reasonable degree of ideological heterogeneity and often persist even as administrations change. Nonetheless, the claim that judicial interpretations are more stable over time but less ideologically consistent across issues than agency interpretations is plausible as a first-order generalization, and this institutional difference, which has generally been ignored in the positive literature and touched on only indirectly in the legal literature, turns out to have interesting implications for legislative preferences regarding allocation of interpretive authority.

II. FORMAL ANALYSIS

The objective of this Article is to analyze the implications that a set of assumptions about legislators, agencies, and courts have for the legislative allocation of interpretive power. This Article is an exercise in positive theory, rather than an empirical analysis or a normative argument. The purpose of the project is to make explicit a set of assumptions that seem plausible as a stylized representation of a real-world situation, and to derive their logical implications to see what empirical regularities the assumptions predict and how these predictions change as other variables of interest change. Following a well-established methodological tradition in the social sciences, this Article uses a formal model — the mathematical representations of assumptions and derivations of conclusions — to investigate these questions of positive theory. The formalization is useful in making assumptions (including problematic or debatable assumptions) more explicit, ensuring the logical coherence of the analysis, and clarifying the causal mechanisms at work. The model, however, is merely an expository technique; the underlying arguments could all be made without any math. Readers unfamiliar with or uninterested in formal analysis should be able to skim this Part to get a sense of the main assumptions and predictions of the positive analysis before proceeding to Part III, which discusses the substantive implications of the analysis.

A. The Model

Consider a single rational legislator who intends to vote on a statute containing ambiguous provisions.[56] The legislator may be aware

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[55] *See* McNollgast, *supra* note 53, at 1646 (concluding that the Supreme Court manipulates doctrine to induce greater compliance by lower courts).

[56] I focus on the vote of a single legislator rather than the collective decision of the legislature to avoid the inherent complexity and institutional contingency of collective legislative choice. *See* Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979).

of some of these ambiguities, but unmodeled exogenous factors, such as legislative transaction costs, make greater statutory specificity undesirable or impractical. The legislator also recognizes that unanticipated issues will arise and that she will care about how they are resolved.[57] Because the legislator is assumed to prefer delegation to not passing the statute at all, she asks not, "Should I delegate?" but rather, "To whom should I delegate?"[58] In particular, she must decide whether to delegate to an administrative agency or to a court. While real legislatures may have some degree of control over how agencies and courts go about their interpretive business — say, by legislating rules of statutory interpretation,[59] by influencing the structure and process of agency or judicial decisionmaking,[60] or by engaging in ex post oversight[61] — for simplicity, I assume that the interpretive characteristics of agencies and courts are exogenous and common knowledge.[62] Thus, the legislator makes a choice between two options: (1)

The model could also be applied to a constituent or interest group considering whether to lobby the legislature for agency delegation or judicial delegation.

[57] It may seem counterintuitive to suppose that a legislator will care about how unanticipated issues are resolved. Indeed, if the issue is unanticipated when the statute is passed, how can a legislator have an opinion about how it should be resolved? The puzzle disappears, however, if one considers that the resolution of an unanticipated issue will create winners and losers. The legislator wants to maximize the degree to which the winners are the legislator's constituents or pet causes. So, for example, an environmental statute might contain an ambiguity that no one recognizes at the time of passage — say, because a provision as written may or may not apply to a technology that does not exist when the statute is passed — but a "green" legislator would prefer that any such issue is resolved in a manner that is more protective of the environment, while a libertarian or pro-industry legislator would prefer that this sort of issue is resolved in a manner that imposes fewer burdens on industry.

[58] As noted earlier, the legislator might delegate explicitly, or she might delegate implicitly by leaving statutory terms ambiguous. *See supra* notes 12–15 and accompanying text. The model applies to either type of delegation.

[59] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088–90 (2002).

[60] *See* Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

[61] *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–67 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 765–75 (1983).

[62] The model also assumes that courts and agencies do not strategically choose their interpretive approaches to alter the degree to which legislators delegate interpretive decisions to them. In reality, courts or agencies might make their decisions to maximize their capacity to affect public policy, or in the alternative, to minimize their own workload. An interesting game-theoretic extension of my decision-theoretic model would be to allow courts and agencies to behave as strate-

pass the statute and delegate interpretation of ambiguous provisions to a court; or (2) pass the statute and delegate interpretation of ambiguous provisions to an agency.

The legislator cares about how each issue is resolved in each time period the statute is in effect. Denote the legislator's dissatisfaction with the resolution of issue n at time t by $x_{nt} \geq 0$, where $x_{nt} = 0$ means that the resolution of issue n at time t corresponds to the legislator's ideal, and higher values of x_{nt} indicate less desirable outcomes for the legislator. The expected value of each x_{nt} when the legislator delegates to decisionmaker $j \in A, C$ (where A denotes "Agency" and C denotes "Court") is $\mu_j \geq 0$.

The statute remains in effect for an infinite number of periods indexed by $t = \{0, 1, 2, \ldots\}$, and the legislator discounts each x_{nt} by a constant factor δ^t, where $0 < \delta < 1$.[63] The statute contains an infinite number of ambiguous provisions indexed by $n = \{0, 1, 2, \ldots\}$, but the legislator does not view these ambiguities as equally significant. To capture the legislator's differential weighting of different issues, I assume that she discounts each x_{nt} by a constant factor α^n, where $0 < \alpha < 1$. In other words, the various issues are indexed by n in descending order of importance, and the ratio of the weights assigned to issue n and the next most important issue, $n+1$, is a constant, $1/\alpha$. When α is close to 1, many issues have roughly equal importance; when α is low, the salience of less important issues drops off much more sharply. Although the functional form for intertemporal discounting is conventional, my use of a parallel functional form to capture the different weights assigned to different issues is admittedly arbitrary and made for mathematical and expositional convenience. Alternative functional forms that capture the same intuition — for instance, a weighting system that assigns positive and equal weight to some finite subset of issues and zero weight to all other issues — yield similar qualitative results.[64]

The legislator may also care about interpretive consistency as such. That is, independent of whether she is pleased with a particular interpretive decision, she may wish for decisions to be consistent across issues and over time. Denote the costs associated with decisionmaker j's inconsistent resolution of issue n over time as $\alpha^n \lambda^T \left(1 - \rho_j^T\right) \sigma_j^2$, where

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gic actors with policy preferences and institutional constraints. That extension of the project, however, is something I defer to future research.

[63] This method of discounting could also be consistent with a statute of finite but indefinite duration, as δ^t could incorporate the probability that the statute is no longer in effect by period t.

[64] Of course, the intertemporal discounting function, though conventional, is also somewhat arbitrary. For example, a legislator may care strongly about an issue in the years preceding reelection and not at all afterwards. However, as with interissue discounting, alternate functional forms yield similar qualitative results.

$\lambda^T \geq 0$ is the weight the legislator attaches to intertemporal consistency, $\sigma_j^2 \geq 0$ is the variance of any given x_{nt} when decisions are made by decisionmaker j, and $\rho_j^T \in [0, 1]$ is the intertemporal correlation coefficient for j's decisions. This expression is a simplified way to capture the fact that, when x_{nt} values differ from one another, certain types of undesirable outcomes (such as adjustment costs or regulatory confusion) may result. The value of any given x_{nt} is determined both by a time-dependent stochastic component and by a time-independent component that together produce a variance σ_j^2. The parameter ρ_j^T measures the degree to which the value of x_{nt} is determined by time-independent factors rather than period-specific factors. The analogous cost associated with interissue inconsistency at time t is $\delta^t \lambda^N \left(1-\rho_j^N\right) \sigma_j^2$.[65]

My argument that judicial interpretations of statutes, relative to agency interpretations, tend to be more stable across time but more ideologically heterogeneous within each time period implies that $\rho_C^T > \rho_A^T$ and $\rho_C^N < \rho_A^N$. For most of the analysis, I assume perfect stare decisis ($\rho_C^T = 1$) and perfectly centralized agency decisionmaking ($\rho_A^N = 1$), assumptions that greatly simplify the formal analysis and clarify the exposition of the main results. Later, I relax these assumptions to investigate the effects of weakening the stare decisis norm and of allowing more ideological heterogeneity in agency decisions.

The legislator's utility function exhibits increasing marginal harms from unfavorable outcomes — in other words, the legislator is risk averse. Adopting the arbitrary but conventional (and convenient) assumption of a quadratic utility function, we can write the legislator's expected utility from delegating to decisionmaker j as the negative square of her total expected dissatisfaction, taking into account both substantive and consistency interests:

$$EU = -E\left[\sum_{n=0}^{\infty} \sum_{t=0}^{\infty} \alpha^n \delta^t x_{nt} + \lambda^T \left(1-\rho_j^T\right) \sigma_j^2 \sum_{n=0}^{\infty} \alpha^n + \lambda^N \left(1-\rho_j^N\right) \sigma_j^2 \sum_{t=0}^{\infty} \delta^t\right]^2. \quad (1)$$

This functional form is somewhat unconventional insofar as I do *not* assume per-period utilities are additively separable. Rather, each time- and issue-discounted payoff is incorporated into a single payoff function with declining marginal benefits. This functional form, in con-

[65] I assume that λ^T is independent of δ and that λ^N is independent of α. In other words, I assume that the importance the legislator attaches to the *substantive* resolution of issue n in future periods is unrelated to how much the legislator cares that all decisions rendered on issue n are *consistent* over time, and that the difference between the importance the legislator attaches to each issue and the next most important issue is uncorrelated with the legislator's desire that both of these issues be resolved consistently. I recognize, however, that in some cases these assumptions may not hold, and the reader may keep this in mind when interpreting my subsequent analysis and discussion.

trast to one that is additively separable, allows modeling a decision-maker's interest in diversifying risk over time.[66]

Adopting the simplifying assumption that all issues are addressed and resolved in the first period,[67] the legislator's respective expected utilities associated with delegating to the agency and to the court are:

$$EU_A = -\frac{1}{(1-\alpha)^2(1-\delta)^2}\begin{bmatrix}\left(\mu_A + (1-\delta)\lambda^T\left(1-\rho_A^T\right)\sigma_A^2\right)^2 \\ +\sigma_A^2\left(\rho_A^T + \frac{1-\delta}{1+\delta}\left(1-\rho_A^T\right)\right)\end{bmatrix} \quad (2)$$

and

$$EU_C = -\frac{1}{(1-\alpha)^2(1-\delta)^2}\begin{bmatrix}\left(\mu_C + (1-\alpha)\lambda^N\left(1-\rho_C^N\right)\sigma_C^2\right)^2 \\ +\sigma_C^2\left(\rho_C^N + \frac{1-\alpha}{1+\alpha}\left(1-\rho_C^N\right)\right)\end{bmatrix}. \quad (3)$$

Next, define

$$\begin{aligned}\Delta_{AC} &= (1-\alpha)^2(1-\delta)^2\left(EU_A - EU_C\right) \\ &= \begin{bmatrix}\left(\mu_C + (1-\alpha)\lambda^N\left(1-\rho_C^N\right)\sigma_C^2\right)^2 - \left(\mu_A + (1-\delta)\lambda^T\left(1-\rho_A^T\right)\sigma_A^2\right)^2 \\ +\sigma_C^2\left(\frac{1-\alpha+2\alpha\rho_C^N}{1+\alpha}\right) - \sigma_A^2\left(\frac{1-\delta+2\delta\rho_A^T}{1+\delta}\right)\end{bmatrix}.\end{aligned} \quad (4)$$

If $\Delta_{AC} > 0$, then ex ante the legislator prefers delegating to the agency. If $\Delta_{AC} < 0$, then the legislator prefers delegating to the court.

It is worth noting that equation (4) incorporates the expected policy loss (on any given issue in any given time period) from judicial interpretation (μ_C, the expectation of x_{nt} when the legislator delegates to the court) and the analogous expected policy loss from agency interpretation (μ_A), with agency delegation becoming more desirable as μ_C increases or as μ_A decreases. In real-world terms, these parameters might reflect differences in expertise or differences in the expected "slack" of each agent. Therefore, though the subsequent analysis and discussion does not focus on expertise and slack variables, they are implicitly incorporated through these parameters.

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[66] *Cf.* Manel Baucells & Rakesh K. Sarin, A Paradox in Time Preference (Oct. 9, 1999), http://repositories.cdlib.org/anderson/dotm/bauc002 (justifying this approach when payoffs correspond to income streams).

[67] This assumption makes the analysis considerably more tractable, but this analytical advantage reduces the model's realism. A richer model would allow issues to arise in any given time period with some nonzero probability. That said, the simplified framework in which all issues are resolved in the first period is still useful in illustrating the underlying tradeoffs at play.

B. Comparative Statics

From the assumption that agency decisions are more consistent across issues and judicial decisions are more consistent across time, it follows immediately that the legislator's interest in agency delegation increases with the legislator's interest in resolving issues in an ideologically consistent manner (λ^N), while delegating to a court is more appealing the more the legislator cares about maintaining a consistent interpretive position over time (λ^T). Equation (4) confirms that this is indeed the case.

Equation (4) also reveals several other implications of the model's assumptions, some of which may be less immediately apparent. To begin with, the legislator's preference for agency delegation decreases as the variance associated with agency decisions (σ_A^2) increases,[68] and — perhaps more interestingly — this effect arises for two distinct reasons: first, increasing the variance of agency decisions increases losses associated with intertemporal inconsistency, and second, increasing the variance of agency decisions makes agency delegation more risky and hence less desirable. Because of this second effect, increasing agency variance reduces the value of agency delegation even when the legislator does not care about intertemporal consistency at all. The results for judicial variance are analogous: increasing the variance associated with judicial decisions (σ_C^2) makes agency delegation relatively more attractive.

A straightforward but important observation related to this difference-in-variance effect is that it can outweigh a difference-in-mean effect that cuts the other way. For example, a difference-in-mean effect favoring the agency ($\mu_C > \mu_A$) — due, perhaps, to the agency's greater expertise or political responsiveness — can be overcome by a risk-aversion effect favoring the court, if the variance of agency decisions (σ_A^2) is sufficiently large relative to the variance of judicial decisions (σ_C^2). An inconsistency-avoidance effect can also lead a rational legislator to prefer delegating to a court even if the difference-in-mean effect favors the agency, so long as the legislator's desire for intertemporal consistency (λ^T) is sufficiently strong and her desire for interissue consistency (λ^N) is sufficiently weak.[69] This observation suggests that an exclusive focus on differences in means — a focus implicit in most versions of expertise and slack minimization theories — may lead to incorrect predictions regarding legislative preferences.

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[68] The derivative is $\partial\Delta_{AC} / \partial\sigma_C^2 = 2\left(\mu_C + (1-\alpha)\lambda^N (1-\rho_C^N)\ \sigma_C^2\right)(1-\alpha)\lambda^N + (1-\alpha)/(1+\alpha) > 0$. A similar result can be calculated for courts: $\partial\Delta_{AC} / \partial\sigma_A^2 = -2\left(\mu_A + (1-\delta)\lambda^T (1-\rho_A^T)\ \sigma_A^2\right)(1-\delta)\lambda^T - (1-\delta)/(1+\delta) < 0$.

[69] This statement is true only if $\sigma_A^2 \neq 0$.

Equation (4) also implies that increasing the relative importance of future decisions (by increasing δ) makes agency delegation relatively more desirable for two reasons. First, the advantages of diversifying intertemporal risk, which the agency does more effectively than the court, are greater when future periods are heavily weighted. Second, a high intertemporal discount parameter means the legislator cares more about the interissue inconsistency costs realized in future periods. Due to the parallel functional forms, these results are similarly applicable to interissue discounting (α). Heavy discounting of less important issues (α low) makes delegation to courts relatively less appealing, both because the legislator's interest in interissue risk diversification is weaker, and because the legislator cares less about intertemporal consistency for the less important issues.

These results may appear counterintuitive. Why would a legislator who attaches greater weight to future time periods prefer delegation to agencies, the institutions that provide less intertemporal consistency? Similarly, why would a legislator who attaches greater weight to lesser issues prefer delegation to courts, when agencies are better at ensuring interissue consistency? The reason is that the model assumes that the legislator's interest in consistency (both intertemporal and interissue) is independent of the legislator's interest in the substantive outcome of a particular issue in a future period.[70]

A stylized example of a case in which this condition is plausible might involve the stringency of an automobile emissions standard in multiple jurisdictions, for which the interpretation of the standard's stringency in each jurisdiction counts as a different "issue" for purposes of the analysis. A senator from state *X* cares about emissions and automobile prices in state *X*; she may care a lot, a little, or not at all about emissions and prices in state *Y*. But if automobile manufacturers face higher costs because they must comply with multiple inconsistent standards, and this inconsistency raises automobile prices in state *X* (without any offsetting positive effects in terms of emissions), then the senator from state *X* has an interest in interissue (that is, interjurisdiction) consistency that is independent of her interest in the substantive resolution of other issues (that is, the standards in other states). The senator from state *X*, however, will bear these interissue inconsistency costs in each time period. If she has a long time horizon (δ high), these inconsistency costs will weigh more heavily in her calculations, making delegation to agencies relatively more desirable.

One might reasonably critique the assumptions that the legislator's interest in interissue consistency (λ^N) is independent of how heavily she discounts other issues (α), and that the legislator's interest in intertem-

[70] *See supra* note 65.

poral consistency (λ^T) is likewise independent of how heavily she discounts future time periods (δ). For example, if the costs of inconsistency take the form of "switching costs" that are borne in the particular period in which the prevailing interpretation changes, then heavy discounting of future periods may mean a weaker interest in intertemporal consistency. If this is the case, then the comparative static results relating to the discount parameters would become more complex. It is possible, nonetheless, to conjecture what these comparative statics would look like. Assigning greater importance to the future would still make agency delegation more desirable because of the greater interest in diversifying intertemporal risk, which agencies do better than courts; but at the same time, it would make agency delegation less desirable by intensifying the interest in maintaining intertemporal consistency, which agencies do worse than courts. Under these circumstances, there would be a tradeoff between consistency and risk diversification, and therefore, the ultimate effect of a greater weight on future decisionmaking would depend on which interest is more important to the legislator.

Perhaps the most interesting comparative static results concern the intertemporal and interissue correlation of agency and court decisions. Increases in the correlation of agency decisions across time (ρ_A^T), which can be thought of as increases in agency inertia, make agency delegation more attractive if and only if:

$$\frac{\partial \Delta_{AC}}{\partial \rho_A^T} = \frac{2\delta\sigma_A^2}{1+\delta}\left[\left(\mu_A + (1-\delta)\lambda^T(1-\rho_A^T)\ \sigma_A^2\right)\left(\frac{1-\delta^2}{\delta}\right)\lambda^T - 1\right] > 0\cdot \qquad (5)$$

This condition is more likely to be satisfied if the legislator places a high value on intertemporal consistency (λ^T high), if expected agency policy is bad for the legislator (μ_A high), and if future time periods are heavily discounted (δ low).

Similarly, increases in the ideological consistency of judicial decisions across issues (ρ_C^N) (which can be thought of as increases in judicial homogeneity and predictability) make agency delegation more attractive if and only if:

$$\frac{\partial \Delta_{AC}}{\partial \rho_C^N} = \frac{2\alpha\sigma_C^2}{1+\alpha}\left[1 - \left(\mu_C + (1-\alpha)\lambda^N(1-\rho_C^N)\ \sigma_C^2\right)\left(\frac{1-\alpha^2}{\alpha}\right)\lambda^N\right] > 0\cdot \qquad (6)$$

This condition is more likely to be satisfied when the legislator cares relatively little about consistency across issues (λ^N low), expects generally favorable judicial decisions (μ_C low), and does not heavily discount less important issues (α high).

Relaxing the assumptions of perfect stare decisis ($\rho_C^T = 1$) and perfect agency centralization ($\rho_A^N = 1$) yields similar results. Weakening

stare decisis (decreasing ρ_C^T) makes agency delegation more attractive if:

$$\frac{2\delta\sigma_C^2}{(1+\delta)}\left[\left(\frac{1+2\alpha\rho_C^N-\alpha}{(1+\alpha)}\right)-\begin{pmatrix}\mu_C+(1-\delta)\lambda^T\left(1-\rho_C^T\right)\sigma_C^2\\+(1-\alpha)\lambda^N\left(1-\rho_C^N\right)\sigma_C^2\end{pmatrix}\left(\frac{1-\delta^2}{\delta}\right)\lambda^T\right]<0. \qquad (7)$$

Equation (7) is more likely to be satisfied if the legislator places a high value on intertemporal consistency (λ^T high), if the legislator discounts future decisions heavily (δ low), and if the expected loss from judicial decisions is substantial (μ_C high). These results parallel the results associated with increasing the intertemporal consistency of agency decisions (ρ_A^T).

Similarly, allowing greater ideological variation between agency decisions within a given time period (decreasing ρ_A^N) increases the appeal of agency delegation if:

$$\frac{2\alpha\sigma_A^2}{(1+\alpha)}\left[\left(\frac{1+2\delta\rho_A^T-\delta}{(1+\delta)}\right)-\begin{pmatrix}\mu_A+(1-\alpha)\lambda^N\left(1-\rho_A^N\right)\sigma_A^2\\+(1-\delta)\lambda^T\left(1-\rho_A^T\right)\sigma_A^2\end{pmatrix}\left(\frac{1-\alpha^2}{\alpha}\right)\lambda^N\right]>0. \qquad (8)$$

Equation (8) is more likely to hold when the legislator places a low value on interissue consistency (λ^N low), does not heavily discount less important issues (α high), and views the expected outcomes of agency decisions as relatively favorable (μ_A low).

These results highlight the central tradeoff between agency and court delegation with regard to the role of uncertainty in legislative choice. Agency decisions are stable across issues but vary across time, while court decisions vary across issues but are stable across time. Increasing variability along either of these two dimensions diversifies risk but entails inconsistency costs. Delegation to agencies purchases intertemporal risk diversification and interissue consistency at the price of intertemporal inconsistency and a lack of risk diversification across issues. Delegation to courts involves the opposite tradeoff. The question then becomes what we can say — either generally or with regard to specific issues — about the real-world factors associated with how rational legislators would handle this tradeoff.

III. DISCUSSION

I consider five factors that may influence legislators' decisions to delegate to agencies or courts: (1) the nature of the policy problem and the statutory response; (2) legislators' political incentives, including interest group pressure; (3) the characteristics of judicial statutory interpretation; (4) the characteristics of agency statutory interpretation; and (5) the characteristics of judicial review of agency action. Within each category, the discussion suggests some preliminary hypotheses as to

how the institutional characteristics of agencies and courts captured in the formal analysis might influence legislative preferences. I defer to future research the development of a more comprehensive theory that synthesizes hypotheses about variance and uncertainty with existing research about expertise, slack minimization, and blame deflection/ credit claiming, and that incorporates a richer, more nuanced understanding of institutional differences between agencies and courts.

A. The Nature of the Policy Problem and the Statutory Response

Legislators' preferences regarding the choice between agencies and courts will be influenced by characteristics of the policy concern they are trying to address and of the statutory scheme they have designed to address it. While there are many possible ways these issues might affect legislative preferences, four seem particularly salient: first, the relative importance of interissue and intertemporal consistency regarding the policy issue; second, whether the statute addresses a long-term or short-term problem; third, whether addressing this problem requires resolving only a handful of very important interpretive issues or instead requires addressing many interpretive questions of roughly similar importance; and fourth, whether the scope of authority delegated by the statute is broad or narrow.

Consistency interests. If the assumption that courts are better at maintaining intertemporal interpretive consistency is correct, then legislators are more likely to prefer delegation to courts in cases in which the legislative interest in intertemporal consistency (λ^T) is strong,[71] unless agencies develop institutional mechanisms to make their decisions more stable over time (that is, increase ρ_A^T).[72] A legislator's interest in intertemporal consistency is likely to be stronger when compliance with a statute requires large, irreversible investments — for example, when the interpretive question involves the permissible forms of business organization or the selection of an industry-wide technological standard. Agency delegation, however, is more appealing when intertemporal risk diversification concerns outweigh intertemporal consistency interests. Such a situation may occur when changes in interpretation over time do not impose substantial switching costs or implicate significant reliance interests — for example, when the interpre-

[71] As noted above, *supra* p. 1055, however, in some such cases the legislator's interest in intertemporal consistency may plausibly be negatively correlated with the degree to which the legislator discounts future periods, violating one of the model's assumptions. While this problem would not affect the specific result under discussion here, it should be kept in mind when considering the more general implications of the analysis.

[72] Agencies may accomplish this aim by adopting internal decisionmaking procedures that make interpretive change more costly or difficult. *See infra* p. 1068. The legislature and judiciary can also increase the intertemporal stability of agency decisions by imposing requirements that increase the costs of policy change. *See supra* p. 1050.

tive question involves whether a particular industry, organization, or class of individuals qualifies for a federal subsidy, so long as the lack of the subsidy would not threaten the recipients' financial stability.

A similar logic applies to the tradeoff between interissue consistency and interissue risk diversification. Interissue consistency is likely to matter more (λ^N higher) when there are strong positive or negative synergies between discrete issues. For example, statutes that create complex incentive schemes or address regulatory problems entailing significant risk-risk or health-health tradeoffs[73] may be more effective if their different provisions are interpreted in a way that reflects a coherent, consistent regulatory strategy, as conflicting interpretations create costs beyond those associated with the substantive resolution of each particular issue. These conditions favor agency delegation. A legislator also has a stronger interest in agency delegation when lack of national uniformity imposes significant costs, as may be the case with respect to regulation of goods or services that either move quickly and easily across jurisdictional lines or are supplied by national firms in multiple geographic markets.[74] In contrast, in cases in which the costs of interissue or interjurisdictional inconsistency are low — that is, when different interpretive questions address discrete problems or the effects of a particular interpretation are localized — the heterogeneity of court decisions may be an advantage rather than a disadvantage because it diversifies interissue or interjurisdiction risk.

The shadow of the future. Regulatory policy areas differ not only with respect to the strength of the legislative interests in intertemporal and interissue consistency, but also with respect to how long lived the issues are likely to be. Many statutes deal with issues that are likely to persist for a long time, such as air pollution, labor relations, abortion policy, and financial regulation. Other statutes target more short-term problems, like allocating emergency aid to airlines in the wake of the 9/11 attacks[75] or determining liability for the costs of addressing the "millennium bug."[76] Whether a particular individual or organization qualifies for a license or regulatory exemption is also likely to be an issue of short-term rather than long-term significance, unless the decision has a substantial precedential effect or the potential licensee is an important, long-lived player in the relevant market. Because a legisla-

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[73] *See generally* Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1535–36 (1996); W. Kip Viscusi, *Risk-Risk Analysis*, 8 J. RISK & UNCERTAINTY 5, 5–6 (1994).

[74] This analysis makes use of the fact that, in the model, resolution of two separate "issues" in a particular time period may be thought of as the resolution of the same substantive issue in two different jurisdictions.

[75] *See* Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (Supp. II 2002).

[76] *See* Year 2000 Computer Date Change (Y2K) Act, 15 U.S.C. §§ 6601–6617 (2000).

tor's interest in how issues are resolved in future periods (δ) correlates positively with her preference for agency delegation,[77] she is more likely to prefer agency delegation for statutes that address long-lived issues than for those that deal with short-term problems.[78]

The number of important issues. Some regulatory policy areas may involve only a handful of really important questions. This could be because only a few applications of the statute implicate salient political conflicts, or because the elaboration of a small number of rules will govern a large number of specific cases that arise under the statute.[79] Such policy areas may be characterized, in the model's terms, as ones in which less important issues are heavily discounted (α low). This is conducive to a preference for delegation to agencies rather than courts because it means that a legislator's interest in interissue risk diversification is low and that the legislator cares little about intertemporal consistency for the less important issues.[80] By contrast, for statutes that require application of general standards to the facts of particular cases on a more individualized basis — for example, antifraud laws[81] or licensing schemes that involve application of a subjective standard like "public interest"[82] — legislators would tend to favor delegation to courts because such statutes implicate a larger number of discrete interpretive issues of roughly comparable importance.[83]

The scope of delegation. The degree to which a legislator discounts future periods (δ) and less important issues (α) is influenced not only by the nature of the policy area, but also by the scope of the delegation. For example, legislators may discount future periods more substantially for a statute with a sunset provision than for a statute of indefinite duration, making the former more likely to be associated with

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[77] *See supra* p. 1054.

[78] Again, this conclusion depends in part on the assumption that the legislator's interest in intertemporal consistency is uncorrelated with how much the legislator discounts future periods. If that assumption is relaxed, and if the interest in intertemporal consistency is correlated with the intertemporal discount parameter, then increasing the weight attached to future periods will have two effects that cut in opposite directions: it will strengthen the interest in intertemporal risk diversification, making agency delegation more attractive, but it will also strengthen the interest in intertemporal consistency, making delegation to courts more attractive. Which effect predominates depends on the other parameters and on the strength of the correlation between the intertemporal discount factor and the interest in interissue consistency.

[79] *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 573, 622 (1992).

[80] When α is low, the difference in importance between issues is greater than when α is high, and the importance of lower-ranked issues approaches zero very rapidly.

[81] *See* Kaplow, *supra* note 79, at 618–19.

[82] *See, e.g.*, Communications Act, 47 U.S.C. § 303 (2000).

[83] The caveat regarding the correlation between the discount parameter and the interest in consistency applies in the interissue context, just as it applies in the intertemporal context. *See supra* p. 1055; note 78.

delegation to courts and the latter with delegation to agencies.[84] Similarly, a statute that delegates narrow authority to resolve a few specific issues might be characterized as one in which less important issues are heavily discounted (α low), while a statute that delegates broad policymaking power might imply a large number of issues that have roughly similar importance (α high). This suggests, all else equal, that legislators are more likely to favor the courts when a statute delegates broadly, while narrow delegations lend themselves to a preference for agencies. This prediction, however, is subject to an important qualification: though the model treats the discount parameters as exogenous, the scope of delegation is largely a legislative choice. I defer this endogeneity complication to future research.

Summary. The legislative interest in delegating to agencies is likely to be particularly strong when a statute requires resolving a relatively small number of issues with long-term significance, especially when intertemporal consistency is not very important. Statutes in which Congress delegates the formulation of a few basic rules that can be applied more or less mechanically to a large number of cases would fit these criteria. Legislators are more likely to prefer delegation to courts when a statute delegates the resolution of a large number of issues (which cannot be significantly reduced by promulgating a few simple rules), each of which has relatively short-term significance. The model's predictions are less clear for statutes that delegate broad authority over many important, long-lived issues, or statutes that delegate decisions on a small number of short-lived issues.

B. Incentives of Legislators and Their Constituents

Legislators' incentives in deciding whether to delegate to agencies or courts are shaped by several factors beyond the substantive policy at issue. Consider two such factors: first, whether legislators or influential interest groups have narrow, parochial interests or broad, encompassing interests; and second, whether legislators and interest groups have short or long time horizons.

Broad versus narrow interests. Legislators may perceive the relative difference in importance between different issues as large (α low), even when the issues might appear to be of similar importance to an outside observer. For example, legislators may focus only on the subset of statutory provisions that directly affect their constituents. Or they may care more about provisions that affect interest groups with narrow, specific interests, because in some contexts, the dynamics of

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[84] For a more extensive discussion of how sunset clauses and related provisions influence legislative incentives, see generally Jacob E. Gersen, Temporary Legislation (Sept. 2005) (unpublished manuscript, on file with the Harvard Law School Library).

political organizing favor such groups and allow them to put more pressure on lawmakers than groups with broader interests can.[85] If, for these or other reasons, legislators substantially discount issues they consider less important, they will tend to support delegating to agencies instead of courts. Interestingly, this may be the case even if many legislators with *different* narrow interests must form an alliance to pass a statute. Each legislator might rank issues in a different order of importance, yet because each legislator perceives a relatively large difference between the importance of the most important issue and that of the next most important issue, all have a shared interest in delegating to an agency. Doing so diversifies intertemporal risk regarding the handful of issues or jurisdictions each legislator really cares about.[86]

In other circumstances, legislators might care about a broad array of issues and jurisdictions. This is likely if legislators are motivated by ideological goals rather than constituency-service goals, or if national parties impose discipline. And, while many interest groups are structured around specific narrow issues, other groups — for example, the Business Roundtable or Public Citizen — care about a multitude of statutes and statutory provisions. Because these legislators and interest groups assign relatively high importance to many issues (α high), they have a stronger interest in delegating to courts, which can diversify their interissue risk more effectively.

These observations suggest a few intriguing and (in principle) testable hypotheses about how political trends affect delegation. First, as interest groups proliferate — with the possible consequence that the substantive focus of each group, on average, becomes narrower — we might expect to see delegation to agencies increase, all else equal. Second, if party discipline declines — meaning the party elite with national interests or national ambitions has less influence relative to rank-and-file members concerned with their own districts — then we would expect to see delegation to agencies increase, all else equal. Both of these developments would reduce the strength of the legislative interest in diversifying risk across issues relative to the strength of the legislative interest in diversifying risk across time.

Short-term versus long-term perspective. Different legislators and interest groups may assign different values to future periods, not only because of the relative longevity of the underlying policy issue, but also because of political or institutional considerations. If legislators care more about getting good results while they are still in office, then

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[85] *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 24–25 (1982); *cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 58–59, 125–31 (2d ed. 1971).

[86] It is plausible, though, that the factors that make legislators and interest groups focus on a small number of issues may also tend to make legislators less concerned about interissue ideological consistency. This would tend to make agency delegation less attractive.

a legislator whose expected duration in office is shorter — perhaps because she is at the end of her legislative career or because her district is hotly contested — will discount the future more heavily (δ low). Such a legislator will prefer delegation to courts more than a similarly situated legislator with a longer time horizon. Interestingly, this implies that a stronger incumbency advantage correlates positively with legislative support for agency delegation. One may make a similar argument regarding the time horizons of interest groups. Long-lived groups — including the major political parties, to the extent that they pursue substantive agendas in addition to seeking office — have a relatively stronger interest in agency delegation than do temporary, makeshift groups.

Summary. All else equal, the model predicts that secure legislators with narrow, parochial interests will tend to favor agency delegation, as will long-lived interest groups that care about a narrow set of issues, such as single-firm/single-industry lobbyists or single-issue advocacy groups. For these actors, intertemporal risk diversification is more important than interissue risk diversification, and maintaining interissue consistency in future time periods is more important than maintaining intertemporal consistency on a plethora of unimportant issues. The preferences of large, broad-based advocacy groups are more ambiguous because such groups care about many issues (α high) and care a great deal about the future (δ high). Likewise, it is hard to make predictions about the preferences of party leaders or other legislators who are both politically secure and more focused on broad national or ideological interests.

If, as a general matter, individual legislators and interest groups tend to have long time horizons and narrow, parochial interests, then the analysis suggests a tendency of the political system to produce delegation to agencies rather than courts. The normative conclusions one should draw from this observation, if it proves accurate, are unclear. If the narrow focus of many legislators and interest groups is viewed as a pathology to be resisted, the amount of agency delegation in the current system might be excessive — unless that delegation has other advantages that outweigh the degree to which the system serves groups with narrow interests rather than those with broad interests. A more sanguine view sees benefits to a system in which legislators and interest groups can diversify intertemporal risks on the issues they care most about. While I take no position on this normative question, the preceding analysis is relevant to the ongoing debate about whether courts or other institutions ought to adopt rules that discourage broad delegations to administrative agencies.

C. Characteristics of Judicial Statutory Interpretation

Consider three variable characteristics of the judiciary that might affect its appeal to legislators: first, ideological diversity on the bench; second, the degree to which the Supreme Court exercises centralized control; and third, the strength of the stare decisis norm.

Judicial diversity. In the context of the model, increasing the ideological diversity of the courts has two effects. First, an increase in diversity may shift the expected legislative dissatisfaction with judicial interpretation (μ_c). Whether this development makes delegation to courts more or less attractive to a given legislator (that is, whether μ_c decreases or increases) depends on the correspondence between that legislator's preferences and those of the new "diversity-enhancing" judges. Second, increasing diversity increases the ideological variance of judicial interpretations (σ_C^2). Because this increases intertemporal risk costs and the amount of interissue inconsistency, it makes delegation to courts less appealing. An increase in judicial diversity therefore makes a legislator more inclined to delegate to agencies, unless the increase in diversity shifts the expected outcomes of court decisions sufficiently closer to the legislator's ideal that the change-in-mean effect outweighs the increase-in-variance effect. On this view, legislators see ideological diversity on the bench as, at best, a cost they may have to tolerate if they want to shift expected judicial outcomes closer to their ideal.

This conclusion is subject to two qualifications. First, judicial diversity may confer other benefits on legislators that the model does not capture. Second, diversity in the preceding discussion is measured across decisionmaking units, not individual judges. When cases are decided by multi-judge panels, and when there are multiple pools from which panels are selected (for example, circuits), increasing ideological variance at the judge level may sometimes decrease ideological variance at the panel level. This would be the case if intrapanel diversity has moderating tendencies[87] and if the increase in ideological diversity *within* different circuits reduces the differences in the proportional representation of different ideologies *across* different circuits.[88]

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[87] *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 344–46 (2004).

[88] To illustrate, imagine a system in which there are two circuits, *A* and *B*. Circuit *A* has two liberal judges and one moderate, while circuit *B* has two conservatives and one moderate. Cases in each circuit are decided by a panel of all three of the circuit's judges, and cases are randomly assigned to *A* or *B*. Suppose both moderates retire and are replaced by one liberal and one conservative. Putting the conservative on *A* and the liberal on *B* would decrease intercircuit variance since each circuit would be pulled toward the center. This suggests that intercircuit homogeneity (which may result from a degree of intracircuit diversity) makes delegating to courts more attrac-

The distribution of judicial ideologies across circuits is not the only determinant of the ideological variance of judicial decisions. It is also relevant whether one circuit has exclusive jurisdiction or whether a case may be brought in any court.[89] Exclusive jurisdiction is likely to reduce the ideological variance of judicial decisions (σ_C^2), making delegation to courts more attractive unless the variance of decisions by the circuit with exclusive jurisdiction is high and the variance of decisions by all other circuits (or the circuits in which most of the litigation would wind up if not for the exclusive jurisdiction provision) is low.

Supreme Court supervision. The constraint imposed on lower courts by Supreme Court review might affect both the mean (μ_c) and the variance (σ_C^2) of judicial interpretations.[90] A stronger Supreme Court constraint may move the mean, which has an ambiguous effect on legislative preferences, and reduce the variance, which makes delegation to courts more attractive. Thus, unless expected Supreme Court decisions are sufficiently worse than expected circuit court decisions, more extensive Supreme Court influence over a statute's implementation tends to make legislators more likely to delegate to courts. An interesting implication is that as the percentage of court decisions reviewed by the Supreme Court decreases — which can happen simply because the volume of interpretive questions expands more quickly than the Court's resources[91] — agency delegation (or lodging exclusive jurisdiction in a particular circuit) becomes more appealing to legislators.

Stare decisis. While the basic model assumes that the initial judicial interpretation of each statutory provision endures forever ($\rho_C^T = 1$), this characterization is obviously a simplification that is more realistic in some contexts than others. Judicial decisions might exhibit more variation over time if Congress were to delegate to courts broad powers to flesh out a statute's meaning in a common law fashion,[92] or if

tive to legislatures, while intracircuit homogeneity coupled with intercircuit diversity makes courts less attractive.

[89] For example, the D.C. Circuit has exclusive jurisdiction over some issues, *see, e.g.*, Clean Air Act, 42 U.S.C. § 7607(b) (2000); Comprehensive Environmental Response, Compensation, and Liability Act, *id.* § 9613(a), while the Federal Circuit has exclusive jurisdiction over others, *see* Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(1) (2000). A potentially analogous consideration is whether, within a circuit, the same judge tends to write most of the opinions on the meaning of a certain statute.

[90] This constraint depends on how aggressively and extensively the Supreme Court reviews lower court statutory interpretations and on how faithfully lower court judges try to follow Supreme Court precedents and to estimate the Supreme Court's preferences regarding the resolution of new cases even when the odds of review are low.

[91] *See* Strauss, *supra* note 53, at 1096–1100.

[92] *See supra* note 13 (discussing Sherman Antitrust Act).

Congress were to abrogate stare decisis by statute.[93] As demonstrated above, weakening stare decisis (lowering ρ_C^T) is more likely to increase the relative appeal of agency delegation when the legislator cares a great deal about intertemporal consistency (λ^T high) and/or future periods (δ high), because weakening stare decisis makes courts better at diversifying intertemporal risk but exacerbates the intertemporal inconsistency of court decisions. This result, which is another manifestation of the basic tradeoff between inconsistency costs and risk costs, suggests that, in cases when legislators have delegated courts interpretive authority on long-lived issues, the stare decisis norm is likely to be weaker than one would ordinarily expect.

Summary. All else equal, delegation to courts is less attractive when interpretive decisions are made by an ideologically heterogeneous judiciary subject to minimal Supreme Court supervision. Unless intertemporal consistency is very important, the appeal of judicial delegation is further reduced if courts adhere to a strong stare decisis norm. This suggests that the prevalence of agency delegation in the contemporary American system might be attributable in part to the decline of ideological consensus on the bench coupled with the declining ability of the Supreme Court to exercise centralized control.[94] If the variance of judicial decisions were reduced — because of increased circuit court homogeneity or increased Supreme Court control — then delegation to courts might become more attractive and therefore (all else equal) more likely. Moreover, if intertemporal consistency is not very important in and of itself, relaxation of stare decisis in statutory interpretation cases is also likely to make delegation to courts more appealing to rational legislators.

D. Characteristics of Agency Statutory Interpretation

Consider two institutional and contextual characteristics of agencies that shape the probability distribution associated with agency decisionmaking: first, the degree of centralized presidential oversight; and second, the amount of political polarization, that is, the ideological divergence between the main political competitors on the relevant issues.

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[93] *See* Rosenkranz, *supra* note 59, at 2125; *cf.* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1567–99 (2000).

[94] Whether there has actually been a decline in ideological consensus in the judiciary — that is, whether there has been a marked increase in ideological and jurisprudential heterogeneity — is an empirical question, though several observers have asserted that such a change has indeed taken place. *See, e.g.*, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 2 (1993) (noting "increasing heterogeneity of the federal judiciary").

Presidential supervision. There may be variation, both across agencies and across historical periods, in the degree to which the President exercises centralized control over the interpretive decisions of administrative agencies. The model predicts that this may have implications for the attractiveness, from a rational legislator's perspective, of agency delegation. For example, consider the different institutional positions of executive branch agencies and independent commissions. The former are under the control of officials who answer to the President while the latter are generally governed by bipartisan boards over which the President has only limited removal power.[95] Compared to executive agencies, decisions by independent commissions are therefore likely to exhibit higher correlation across time (ρ_A^T) because they are less likely to follow the election returns. Thus, when the importance of intertemporal consistency (λ^T) is sufficiently high and the shadow of the future (δ) is sufficiently short, agency delegation is more attractive if the agency is an independent commission. When intertemporal consistency is unimportant and the shadow of the future is long, commissions are less attractive than executive agencies.

It may also be the case that independent commissions, by virtue of their insulation from the President, display less ideological consistency across issues. If this is so, delegation to commissions is appealing when the interest in interissue risk diversification is strong (α high) and the interest in interissue consistency is weak (λ^N low). This prediction must be treated with caution, however. Independent commissions may have coherent agendas that lead them to resolve multiple issues with a degree of consistency comparable to what one observes in executive agencies, even though the vicissitudes of electoral politics make the latter less ideologically consistent over time.

Finally, the assumptions that, for administrative agencies, interissue consistency is perfect ($\rho_A^N = 1$) and intertemporal consistency is low ($\rho_A^T < 1$) may not hold even for executive branch agencies. These assumptions are premised on a view of strong presidential control of the bureaucracy that, whatever its merits as a description of contemporary American governance,[96] is neither inevitable nor universal. When these assumptions do not hold, executive branch agencies bear a stronger resemblance to independent commissions as described above. Mechanisms that strengthen centralized presidential control — for ex-

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[95] *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 42–43. On differential removal power, compare *Myers v. United States*, 272 U.S. 52, 176 (1926), affirming the President's plenary removal power with respect to executive agency heads, with *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935), recognizing limits on the President's power to remove heads of independent commissions.

[96] For arguments that the American public administration is currently characterized by strong presidential control, see sources cited *supra* note 30.

ample, regulatory review by the Office of Management and Budget or expanded use of presidential directive authority[97] — will tend to increase the ideological consistency of agency decisions within a given time period (ρ_A^N) and decrease the stability of agency decisions over time (ρ_A^T). This would make agency delegation more attractive to legislators who value intertemporal risk diversification and interissue consistency but less attractive to legislators who value interissue risk diversification and intertemporal consistency.

Political polarization. As parties become more politically polarized — more specifically, as their expected attitudes toward the relevant statutory issues move further apart — the variance of agency decisions (σ_A^2) increases, making agency delegation less attractive.[98] When competitors for executive power "race to the center," or when the relevant interpretive issues are basically technocratic and nonpartisan, such variance is likely to be lower, making agency delegation more attractive. This claim is subject to an important qualification: the same underlying political polarization that increases the variance of agency decisions (σ_A^2) may also increase the variance of judicial decisions (σ_C^2). However, the amount of judicial polarization is likely to be less given that the judiciary is more heterogeneous, less susceptible to central control, and slower in its ideological shifts. A more accurate statement of the hypothesis is that the greater the political polarization of elected politicians relative to the polarization of courts on a given issue, the more likely legislators are to prefer delegating to courts rather than agencies.[99]

Summary. Legislators who care about intertemporal risk diversification and interissue consistency, but not interissue risk diversification or intertemporal consistency, are more partial to agency delegation if the agencies are subject to centralized presidential control. By contrast, legislators interested in interissue risk diversification and intertemporal consistency are more likely to favor agency delegation if the agency operates with some degree of autonomy from the President. Furthermore, rational legislators tend to disfavor agency delegation when executive branch agencies must make decisions on policy controversies that polarize political parties much more than they polarize judges.

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[97] *See* Kagan, *supra* note 30, at 2284–99.

[98] To clarify, I assume here that polarization does not affect the location of the ideological midpoint between the two parties. That is, increased polarization does not affect μ_A.

[99] This result is a close analogue to the main results in my earlier work on the political foundations of judicial independence. *See* Stephenson, *supra* note 32, at 84–85.

E. Judicial Review of Agency Decisions

To this point, the discussion, like the model, has assumed that if Congress delegates interpretive authority to an agency, the courts play no role. The justification for this simplifying assumption is that, under prevailing *Chevron* doctrine, courts are quite deferential to agency interpretations of ambiguous statutes,[100] as well as to other agency exercises of delegated power.[101] But courts do review agency decisions, sometimes aggressively,[102] and the extent and nature of judicial review can vary across time and across issues. While the model does not explicitly incorporate judicial review of agency decisions, it suggests two ways such review might alter the legislator's calculus. First, aggressive substantive judicial review of agency decisions — a tendency of a court to "substitute its judgment for that of the agency"[103] — will reduce any difference between judicial and agency interpretations. In the presence of such aggressive review, the legislator's power to assign interpretive authority to agencies is reduced, and most of the substantive hypotheses developed by the model are therefore less likely to be significant factors in legislative decisionmaking. Second, judicial review of agency action might stress procedure rather than substance. That is, the court might eschew evaluation of the agency's substantive choice but force the agency to demonstrate "reasoned decisionmaking."[104] If such a requirement makes policy change more costly — because the agency will have to satisfy this level of judicial scrutiny every time it wants to change its interpretation of a statute[105] — it will increase the intertemporal consistency of agency decisions (ρ_A^T). Judicial review of this sort would increase the appeal of delegating to agencies if intertemporal consistency is more important than intertemporal risk diversification, but it would make agency delegation less attractive if risk diversification is the more salient concern. A similar effect ob-

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[100] Though the actual impact of *Chevron* is the subject of some empirical debate, most evidence to date suggests that it has resulted in greater deference to agency decisions by lower courts. *See* Aaron P. Avila, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398, 429 (2000); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59–60 (1998); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058–59. *But see* Merrill, *supra* note 23, at 980–85.

[101] *See* Dickinson v. Zurko, 527 U.S. 150, 162 (1999); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375–78 (1989); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

[102] *See, e.g.*, R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 9–13 (1983); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 76–77 (1988); Cross, *supra* note 37, at 1019–20.

[103] Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[104] *Id.* at 52.

[105] *Id.* at 41–42.

tains if courts treat divergence from longstanding agency practice as a reason to give agency interpretations less deference.[106]

Conclusion

Legislators who delegate interpretive power must pick the agent to whom they will delegate, thereby choosing which policy lottery they will enter. One of the most basic decisions a legislator must make in this regard is whether to delegate to an administrative agency or to the courts. This Article explores some of the factors that may influence this choice, focusing on a rational, risk-averse legislator's interests in maintaining ideological consistency and diversifying ideological risks. The formal model explores the implications of this tradeoff and also focuses attention on the fact that the legislators confront this tradeoff on two dimensions: across issues and across time. The analysis highlights the importance of institutional features of American courts and administrative agencies that extant scholarship has tended to overlook: court decisions exhibit more stability over time but more ideological heterogeneity across issues, whereas agency decisions are more ideologically consistent within a given time period but more likely to vary across time. Though simple and stylized, the formal model incorporating these features generates a number of hypotheses regarding the conditions under which legislators are likely to prefer agency delegation to court delegation and vice versa.

The analysis presented here is preliminary and exploratory. I have chosen to focus on one particular dimension of the legislative choice. A more comprehensive theory would have to integrate other explanatory variables — including expertise, slack, and credit and blame shifts — as well as other institutional features of the policymaking process, like legislative oversight. This Article should therefore be read as a contribution to a larger project, not as a brief advocating for the primacy of one set of explanatory variables. That said, the influences on legislative preferences I analyze in this Article have generally been overlooked, and they have potential significance for both positive theories of legislative choice and normative theories that rely, explicitly or implicitly, on some such positive theory.

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[106] *Compare* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (suggesting that departure from past practice may justify less deference), *with* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2700 (2005) (holding that deference is due even when agency statutory interpretation changes), *and* Rust v. Sullivan, 500 U.S. 173, 186–87 (1991) (same).