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

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ABSTRACT

This paper contributes to the positive political theory of legislative delegation by modeling formally the decision calculus of a rational legislator who must choose between delegation to an agency and delegation to a court. The model focuses in particular on the legislator's interest in diversifying risk, both across time and across issues, and her interest in avoiding interpretive inconsistency. 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 inter-temporal risk diversification and inter-issue consistency at the price of inter-temporal inconsistency and a lack of risk diversification across issues, while delegation to courts involves the opposite trade-off. From this basic insight the model derives an array of comparative statics regarding the conditions under which rational legislators would tend to prefer delegating to agencies over courts and vice versa. These results imply hypotheses as to how real-world variation in political and policy-specific variables, as well as variation in characteristics of judicial and agency approaches to statutory interpretation, may affect legislators' preferences regarding allocation of interpretive authority.

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

Statutes rarely embody determinate policy choices. Some statutes are deliberately open-ended; others are ambiguous despite attempts at clarity.[1] In either case, legislators cannot predict with certainty exactly how the statute they enact will be interpreted by the decision-maker charged with implementation. As a result, legislators who pass an ambiguous law have not made a policy choice – they have entered a policy lottery. The question why a legislator might prefer such a lottery to legislative specificity has attracted considerable scholarly attention, as have the normative ramifications of possible answers to that question.[2] Sometimes overlooked in this discussion is the fact that legislators have some ability to determine which policy lottery they will enter by specifying which decision-maker shall have primary authority to interpret the statute. Perhaps the most basic decision a legislator may make in this regard is whether to delegate to an administrative agency or to the judiciary. Yet the factors that influence even this elementary choice are not well understood.

This paper contributes to the positive political theory of legislative delegation by modeling formally the decision calculus of a rational legislator who must choose between delegation to an agency and delegation to a court. The model focuses on an institutional difference between agencies and courts that the extant literature has generally neglected:

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[1] Though I use the word "ambiguous," I am talking about a phenomenon that philosophers would, strictly speaking, call "vagueness." I use the term "ambiguous" because it has become conventional in the legal literature. I thank Fred Schauer for pointing this out to me.

[2] *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 30-32 (1999); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218 (1992); Daniel R. Ortiz, *The Self-Limitation of Legislative History: An Intrainstitutional Perspective*, 12 INT'L REV. L. & ECON. 232, 232-34 (1992); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J. L. ECON. & ORG. 33, 39-40 (1986) [Fiorina, *Legislator Uncertainty*]; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 88, 90, 92 (1985); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7, 60-61 (1983); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 55-56 (1982) [Fiorina, *Regulatory Forms*].

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. From this proposition the model derives an array of comparative statics regarding the conditions under which rational legislators would tend to prefer delegating to agencies over courts and vice versa. These results include the following: *First*, the model's assumptions straightforwardly imply that, all else equal, a legislator will prefer courts when she is concerned with interpretive consistency across time, but will prefer agencies when she is concerned with ideological consistency across issues or jurisdictions. *Second*, legislators who care about the long term tend to prefer delegation to agencies, while legislators with short time horizons are more likely to prefer delegation to courts. *Third*, a legislator who attaches roughly similar importance to a large number of interpretive issues will tend to prefer courts, while a legislator who views only a handful of issues as really critical is more inclined toward agencies. *Fourth*, delegation to agencies is less attractive if the policies agencies pursue vary dramatically over time, but is more attractive if judicial decisions are highly unpredictable across issues. These results imply hypotheses as to how real-world variation in political and policy-specific variables, as well as variation in characteristics of judicial and agency approaches to statutory interpretation, may affect rational legislators' preferences regarding allocation of interpretive authority.

I. THE PUZZLE AND THE EXTANT LITERATURE

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,[3]

[3] 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); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000). While the "expertise" justification for delegation is most often associated with delegation to

politicians' desire to duck blame for unpopular choices[4] or to create new opportunities for constituency service,[5] the inability of multimember legislatures to reach stable consensus,[6] and the impossibility (or excessive cost) of anticipating and resolving all relevant implementation issues in advance.[7] This paper addresses a closely related but distinct question: "Given that legislators have an interest in delegation, *to whom* would they prefer to delegate?" More specifically, under what conditions will legislators prefer delegation to administrative agencies rather than courts? The answer to this question has important implications for both the positive study of legislative behavior and the normative evaluation of legal doctrine.

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 1887 Interstate Commerce Act 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 (APA) were fundamentally about how to allocate decision-making power between agencies and

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agencies, some scholars have also suggested that legislative delegation to independent courts can be explained by courts' superior fact-finding 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).

[4] On how legislators avoid blame or claim credit by delegating to courts, see Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91, 104 (2000); 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); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993). On how legislators avoid blame or claim credit by delegating to agencies, see Aranson et al., *supra* note 2 at 56-62; Fiorina, *Regulatory Forms*, *supra* note 2 at 46-52.

[5] On the usefulness of agency delegations in creating new opportunities for constituency service, see Fiorina, *Regulatory Forms*, *supra* note 2 at 53; MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 46-49, 71 (1977).

[6] The instability of collective legislative choice has been invoked 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 4 at 366-68.

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

[8] Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J. L. ECON. & ORG. 35, 47-49 (1989); Fiorina, *Legislator Uncertainty*, *supra* note 2 at 33-37.

courts.[9] Subsequent proposals to amend the APA focused more specifically on how much deference courts should accord agency interpretations of statutes.[10] In many other cases, even though Congress hasn't explicitly debated the relative virtues of agency and judicial interpretation, it nonetheless has made a relatively clear choice between these options. Numerous statutes, for example, expressly confer on agencies the power to enact regulations to flesh out statutory mandates,[11] while in other statutes Congress expresses an implicit preference for judicial interpretation by declining to entrust enforcement authority to any particular agency[12] or (perhaps) by assigning responsibility to many agencies.[13]

Even when legislators have not clearly considered the choice between agencies and courts, a number of key administrative law doctrines are grounded in hypotheses about which option the legislators implicitly chose, or would have chosen if they had considered the question and put it to a vote.[14] The *Chevron* doctrine,[15] which holds that

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

[10] 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* Farina, *supra* note 22 at 473-74; 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) and the preemption clause of the Gramm-Leach-Bliley Banking Act, 15 U.S.C. §6714(e).

[11] For example, the 1934 Securities Exchange Act makes it unlawful to employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or the protection of investors," 15 U.S.C §78j(b), and the 1934 Communications Act similarly authorizes the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the interconnection duties mandated by the Act, 47 U.S.C. §201(b).

[12] Examples include the Sherman Antitrust Act, *see* Nat'l Society of Professional Engineers v. U.S., 435 U.S. 679, 688 (1978) ("The legislative history [of the Sherman Act] makes 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 2 at 139; and the Fair Labor Standards Act, *see* Kirschbaum 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 … National Labor Relations Act, 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, 137-38 (1944).

[13] *See* Collins v. Natl Transp. Safety Bd., 351 F.3d 1246, 1252-53 (2003) (citing cases).

[14] Some scholars have suggested that Congress or the courts should adopt institutional reforms that 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).

courts must defer to reasonable agency interpretations of ambiguous statutes, presumes that statutory ambiguity reflects a legislative intent to delegate to agencies.[16] Similarly, exclusion of certain interpretive questions from *Chevron*'s domain[17] is often justified by the claim that legislators did not or would not want to agencies to have interpretive authority on those questions.[18] A better understanding of legislative preferences is therefore relevant to an assessment of *Chevron* and its exceptions.[19] Legislative preferences regarding the allocation of interpretive authority may also have implications for judicial enforcement (or non-enforcement) of the non-delegation doctrine, as rigorous enforcement of this doctrine would have the effect of transferring considerable interpretive power from agencies to courts.[20]

Despite the extensive positive literature on legislative delegation[21] and the voluminous normative literature on how courts should allocate interpretive authority

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

[16] *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 for a reasonable construction made by the administrator of an agency.").

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

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

[19] *See* Merrill & Hickman, *supra* note 17 at 872 (2001) ("[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 231 n.11 (quoting Merrill & Hickman, *supra*). 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 the design of default rules that are intended either to mimic informed legislative preferences or to elicit a legislative reaction. *Cf.* 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); Ian Ayres & Robert Gertner, *Filling in Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989).

[20] *See* Spence & Cross, *supra* note 3 at 139-40; Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 775 (1999) (arguing that a revived non-delegation doctrine would "radically increase judicial power over vast areas of American life"). It is worth noting, however, that proponents of a revived non-delegation doctrine, unlike most proponents of *Chevron* doctrine, do not attach substantial normative weight to what legislators want (or would want if asked). Indeed, non-delegation proponents often argue that the doctrine is valuable precisely because it counters what is perceived as an undesirable legislative preferences for buck-passing. *See, e.g.*, Aranson et al., *supra* note 2.

[21] *See supra* notes 2-6.

between themselves and administrative agencies,[22] there has been relatively little positive analysis of the factors that would influence legislative preferences between delegating to courts and delegating to agencies. Some important work has addressed this issue, however. This work emphasizes four factors: (1) the relative expertise of the potential decision-makers (agencies and courts); (2) the preference divergence (or "slack") between the legislator and the potential decision-makers; (3) the opportunities for manipulating voters' attribution of credit and blame for policy outcomes; and (4) the relative variation and uncertainty associated with agency and court decisions. The focus of this paper is on this fourth factor, which has received less attention than the other three. I discuss expertise, slack, and credit/blame manipulation theories briefly to provide context. I then turn to a more extensive discussion of the most influential uncertainty-management theories. I wish to make clear at the outset that I do not view these various theories as mutually exclusive, and I am agnostic as to their relative significance. My focus in this paper on variance and uncertainty 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 therefore are more likely to "get it right" than courts.[23] Agencies, of course, do not have superior information on all

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

[23] *See* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013 (2000). The Supreme Court frequently cites expertise as a justification for presuming Congress prefers that agencies resolve statutory ambiguities. *See, e.g.*, Martin v. Occupational Safety & Health

interpretive issues. On many questions of law or procedure, for example, courts are arguably more expert,[24] and agencies often fail to live up to their "expert" billing even on technical issues.[25] 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 trade-off between the principal's desire to take advantage of the agent's informational advantages and the risk that the agent will pursue goals that diverge from those of the principal.[26] 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 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.[27] Some slack-minimization theories also emphasize institutional differences. For example, because courts are more politically insulated than agencies, they may be

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Review Comm'n, 499 U.S. 141, 151 (1991); Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990); *Chevron*, 467 U.S. at 844-45. A variant on this expertise factor would be the relative speed with which agencies and courts are capable of gathering the necessary information and making decisions.

[24] *See* Breyer, *supra* note 22 at 382-97. *See also* 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).

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

[26] *See* Jonathan 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.

[27] Bendor and his collaborators refer to this as the "ally principal." *See* Bendor & Meirowitz, *supra* note 3; Bendor et al., *supra* note 26. For an application of the ally principal 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*, 68 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).

less susceptible to ongoing congressional influence.[28] While this observation suggests legislators would prefer delegation to agencies, such a conclusion is problematic. While Congress can influence agency decisions, the President can as well, and the President's influence is almost certainly greater.[29] Legislators might also fear that the preferences of future legislatures will diverge from their own.[30] A legislator who anticipates ideological divisions with the President and/or future legislators might prefer delegation to courts.[31] Slack-minimization considerations thus entail complex trade-offs and do not clearly favor agencies or courts as a general matter.

Credit/blame attribution. 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 claim credit for popular ones. Legislators may therefore delegate controversial "no win" decisions, where any outcome will anger some important constituency.[32] Such "blame deflection" arguments have been used to explain both delegation to agencies and delegation to courts.[33] One might imagine, given the greater political insulation of the judiciary, that legislators interested in blame avoidance would prefer delegation to courts. This is not necessarily the case, however, if the legislator and the President are ideological adversaries and the President

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

[29] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1 (1994); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEG. STUD. Q. 475 (1987).

[30] 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 Administrative Agencies': Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503-04 (1989).

[31] *Cf.* Matthew C. Stephenson, *When the Devil Turns…: The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59 (2003); Rui de Figueiredo, *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321 (2002); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989).

[32] *See* Fiorina, *Regulatory Forms*, *supra* note 2 at 46-52; John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L. Q. 233, 242-50 (1990). *But see* Stephenson, *supra* note 3 at 393-94 (noting limits to the blame deflection hypothesis and suggesting an alternative rationalist explanation for behavior patterns associated with blame deflection).

[33] *See supra* note 4.

is seen by voters as more responsible for agency decisions. An alternative blame/credit manipulation hypothesis posits that, if voters are more likely to reward legislators for fixing problems ex post than for avoiding those problems ex ante, legislators have an incentive to delegate to agencies, wait for the agencies to create messes, and then clean up the messes by intervening on constituents' behalf.[34] This suggests a legislative preference for delegation to agencies, as it is harder to 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 courts and delegation to agencies, 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) are risk averse. Second, legislators may value interpretive consistency as such. This is likely if, for example, substantial adjustment costs make adherence to a suboptimal rule preferable to allowing frequent revisions,[35] or if significant problems are associated with uncoordinated regulatory policies.[36]

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 paper owes the greatest intellectual debt – are the contributions of Morris Fiorina.[37] In his seminal paper on legislative choice

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[34] *See supra* note 5. 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.

[35] In addition to switching costs, lack of inter-temporal 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).

[36] *See* Cross, *supra* note 23 at 1029-30. *Cf. also* RONALD DWORKIN, LAW'S EMPIRE 178-86 (1986) (critiquing "checkerboard" legislation). Dworkin, however, assumes – contrary to the argument I develop in this paper – that courts have an institutional advantage in ensuring coherence and integrity across statutes and statutory provisions.

[37] Fiorina, *Regulatory Forms*, *supra* note 2; Fiorina, *Legislator Uncertainty*, *supra* note 2. Fiorina offered an array of possible answers that includes 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.

between legal process and administrative process, Fiorina recognized that because "implementation of a regulatory decision is itself a highly uncertain process,"[38] a legislator's attitude toward risk coupled with the shape of the relevant probability distributions over outcomes affects her choice between judicial and administrative implementation of regulatory statutes.[39] 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 definite result.[40] 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.[41] Critics immediately pointed out that this assumption is non-standard and hard to justify on substantive grounds.[42]

In a subsequent paper, Fiorina abandoned the notion of bell-shaped utility functions and allowed delegation to courts to entail uncertainty.[43] At the same time, though, he adopted other non-standard and controversial assumptions. First, he assumed 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).[44] 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.[45]

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[38] Fiorina, *Regulatory Forms*, *supra* note 2 at 55.
[39] *Id*. at 55-60.
[40] Fiorina acknowledged that the latter assumption was unrealistic and that subsequent work should also treat delegation to courts as a lottery. *Id*. at 60.
[41] *Id*. at 57.
[42] Albert Nichols, *"Legislative Choice of Regulatory Forms": A Comment on Fiorina*, 98 PUB. CHOICE 67, 67 (1982).
[43] Fiorina, *Legislator Uncertainty*, *supra* note 2 at 39.
[44] *Id*.
[45] *Id*. at 39-40.

These assumptions limit the generality of Fiorina's analysis. And, in contrast to the earlier paper, Fiorina's two main results in the later paper have little to do with uncertainty as such. His main conclusions are: (1) "[W]e will find the most solid opposition to and the most solid support for administrative regulation among those relatively far from the median"; and (2) "[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."[46] 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 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, Fiorina's general framework and preliminary insights provide the foundation on which to further develop a theory of rational legislative choice between courts and agencies. This paper contributes to that development, extending and modifying 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. 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. 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

[46] *Id*. at 44-45.

principle is "super-strong" in statutory interpretation cases.[47] This constraint, however, does not apply to administrative agencies, which can and do change their interpretation in response not only to new information but also to changes in the administration's political and regulatory priorities.[48] Second, 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.[49] Courts tend to be more ideologically diverse and less subject to centralized control, and judges are (usually) less partisan and outcome-driven in their interpretations of statutes than are politically-appointed 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, and judges are subject to some centralized ideological control by the Supreme Court. 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

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[47] *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*, and we assess an agency's later interpretation of the statute against that settled law"); Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 205 (1991) (On "a pure question of statutory construction, [] the doctrine of stare decisis is most compelling"); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); 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* William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. J. 1361 (1988); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

[48] *See, e.g.* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency … must consider varying interpretations and the wisdom of its policy on a continuing basis"); American Trucking Assns., Inc. v. Atchison, T. & S.F. 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").

[49] *See supra* note 29.

touched on only indirectly in the legal literature, turns out to have interesting implications for legislative preferences regarding allocation of interpretive authority.

II. ANALYSIS

1. The Model

Consider a single rational legislator who intends to vote on a statute containing ambiguous provisions.[50] The legislator may be aware of some of these ambiguities, but unmodeled exogenous factors 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. Because the legislator is assumed to prefer delegation to the status quo, she asks not, "Should I delegate?" but rather, "To whom should I delegate?" 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,[51] by influencing the structure and process of judicial or agency decision-making,[52] or by engaging in ex post oversight[53] – for

[50] I focus of the vote of a single legislator rather than the collective decision of the legislature as a whole in order to avoid, for purposes of this paper, the inherent complexity and institutional contingency of collective legislative choice. *See* Kenneth Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); Richard McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976). The model could also be applied to the preferences of a constituent or interest group considering whether to lobby the legislature for agency delegation or judicial delegation.

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

[52] *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, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 481 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

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

simplicity I assume that the interpretive characteristics of agencies and courts are exogenous, fixed, and known. Thus, the legislator makes a binary choice between two options: (1) pass the statute and delegate interpretation of ambiguous provisions to the court; or (2) pass the statute and delegate interpretation of ambiguous provisions to the agency.

The legislator cares about how each issue is resolved in each time period the statute is in effect. Denote the legislator's substantive dissatisfaction with the resolution of issue n at time t by $x_{nt} \geq 0$, where $x_{nt} = 0$ means the resolution of issue n at time t corresponds to the legislator's ideal, and higher values of x_{nt} indicate worse outcomes. The expected value of each x_{nt} when the legislator delegates to decision-maker $j \in A,C$ (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 $t = \{0, 1, 2,\ldots, \infty\}$, and the legislator discounts each x_{nt} by factor δ^t, $\delta \in (0, 1)$. (This assumption is also consistent with a statute of finite but indefinite duration, as δ^t incorporates the probability that the statute ends by period t.) The statute contains an infinite number of ambiguous provisions indexed by $n = \{0, 1, 2,\ldots, \infty\}$. The legislator does not view these ambiguities as equally significant, however. To capture the legislator's differential weighting of different issues, I assume she discounts each x_{nt} by factor α^n, $\alpha \in (0, 1)$. In other words, the various issues are indexed by n in descending order of importance, and the ratio of the weights assigned to issue i and the next-most-important issue i+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. While the functional form for inter-temporal discounting is conventional, my use of a parallel functional form to capture the different weights assigned to different issues is admittedly arbitrary, made primarily 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.

The legislator may also care about interpretive consistency as such. Denote the costs associated with decision-maker *j*'s inconsistent resolution of issue *i* over time as $\alpha^i \lambda^T \left(1-\rho_j^T\right)\sigma_j^2$, where $\lambda^T \geq 0$ is the weight the legislator attaches to inter-temporal consistency, $\sigma_j^2 \geq 0$ is the variance of any given x_{nt} when decisions are made by *j*, and $\rho_j^T \in [0, 1]$ is the inter-temporal correlation coefficient for *j*'s decisions. This expression is a simplified way to capture the fact that, when the x_{it}'s differ from one another, certain types of undesirable outcomes (e.g., adjustment costs, regulatory confusion) may result. The value of any given x_{it} is determined both by a time-dependent stochastic component with variance σ_j^2 and by a time-independent component (which is drawn from a distribution with variance σ_j^2, but which is constant across periods). The parameter ρ_j^T measures the degree to which the value of x_{it} is determined by time-independent factors rather than the period-specific shock. The analogous cost associated with inter-issue inconsistency in period *k* is $\delta^k \lambda^N \left(1-\rho_j^N\right)\sigma_j^2$.[54] My argument that judicial interpretations of statutes, when compared with agency interpretations, tend to be more stable across time but more ideologically heterogeneous within each period implies that $\rho_C^T > \rho_A^T$ and $\rho_C^N < \rho_A^N$. For most of the analysis, I assume $\rho_C^T = 1$ (perfect stare decisis) and $\rho_A^N = 1$ (perfectly centralized agency decision-making), assumptions which greatly simplify the formal analysis and clarify the exposition of the main results. Later, I relax these assumptions in order to investigate the effects of weakening the stare decisis norm and of allowing more ideological heterogeneity in agency decisions.

[54] I assume that λ^T is uncorrelated with δ and that λ^N is uncorrelated with α. In other words, I assume 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 has no impact on 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 I note this possibility so that the reader may keep it in mind when interpreting my subsequent analysis and discussion.

The legislator's utility function exhibits declining marginal benefits from favorable 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 decision-maker *j* as the negative square of her total expected dissatisfaction (taking into account both substantive and consistency interests):

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

This functional form is somewhat unconventional insofar as I do *not* assume per-period utilities are additively separable across time. Rather, each time-discounted payoff is incorporated into a single payoff function with declining marginal benefits. This functional form, in contrast to additive separability, allows modeling a decision-maker's interest in diversifying risk over time.[55]

Adopting the simplifying assumption that all issues are addressed and resolved in the first period ($t = 0$), the legislator's respective expected utilities for delegating to the agency and to the court are:

$$EU_A = -\frac{1}{(1-\alpha)^2(1-\delta)^2}\left[\begin{array}{l}\left(\mu_A + (1-\delta)\lambda^T\left(1-\rho_A^T\right)\sigma_A^2\right)^2 \\ +\sigma_A^2\left(\rho_A^T + \frac{1-\delta}{1+\delta}\left(1-\rho_A^T\right)\right)\end{array}\right] \qquad (2)$$

$$EU_C = -\frac{1}{(1-\alpha)^2(1-\delta)^2}\left[\begin{array}{l}\left(\mu_C + (1-\alpha)\lambda^N\left(1-\rho_C^N\right)\sigma_C^2\right)^2 \\ +\sigma_C^2\left(\rho_C^N + \frac{1-\alpha}{1+\alpha}\left(1-\rho_C^N\right)\right)\end{array}\right] \qquad (3)$$

Define

[55] For more on the theoretical justification for this approach when payoffs are income streams, see Manel Baucells & Rakesh K. Sarin, "A Paradox in Time Preference" [manuscript, Oct. 1999].

$$\Delta_{AC} \equiv (1-\alpha)^2(1-\delta)^2(EU_A - EU_C) = \left[\begin{array}{l}\left(\mu_C + (1-\alpha)\lambda^N(1-\rho_C^N)\sigma_C^2\right)^2 - \left(\mu_A + (1-\delta)\lambda^T(1-\rho_A^T)\sigma_A^2\right)^2 \\ + \sigma_C^2\left(\frac{1-\alpha+2\alpha\rho_C^N}{1+\alpha}\right) - \sigma_A^2\left(\frac{1-\delta+2\delta\rho_A^T}{1+\delta}\right)\end{array}\right] \quad (4)$$

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

2. Comparative Statics

Several intuitive conclusions follow immediately from Equation (4). First, the desirability (from the legislator's perspective) of delegating to the agency rather than the court increases with the expected policy loss from judicial interpretation (μ_C) and decreases with the expected policy loss from agency interpretation (μ_A). Substantively, this difference-in-means effect 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.

Second, the legislator's interest in agency delegation is increasing in the legislator's interest in resolving different 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). This, of course, follows straightforwardly from the assumption that agency decisions are more consistent across issues and judicial decisions are more consistent across time.

Third, the legislator's preference for agency delegation is decreasing in the variance associated with agency decisions (σ_A).[56] While this may seem obvious, note that

[56] The first-order conditions are $\frac{\partial \Delta_{AC}}{\partial \sigma_C^2} = 2\left(\mu_C + (1-\alpha)\lambda^N(1-\rho_C^N)\sigma_C^2\right)(1-\alpha)\lambda^N(1-\rho_C^N) + \left(\frac{1-\alpha+2\alpha\rho_C^N}{1+\alpha}\right) > 0$ and $\frac{\partial \Delta_{AC}}{\partial \sigma_A^2} = -2\left(\mu_A + (1-\delta)\lambda^T(1-\rho_A^T)\sigma_A^2\right)(1-\delta)\lambda^T(1-\rho_A^T) - \left(\frac{1-\delta+2\delta\rho_A^T}{1+\delta}\right) < 0$.

changes in variance affect the legislator's calculations for two distinct reasons: (1) increasing the variance of agency decisions increases losses from inter-temporal inconsistency; (2) 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 doesn't care about inter-temporal consistency at all. The results for changes in judicial variance are analogous: Increasing in the variance associated with judicial decisions (σ_C) 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-means effect that cuts the other way. For example, a difference-in-means 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 if the variance of agency decisions (σ_A) is sufficiently large relative to the variance of judicial decisions (σ_C). An inconsistency-avoidance effect can also lead a rational legislator to prefer delegating to a court even if the difference-in-means effect favors the agency, so long as the legislator's taste for inter-temporal consistency is sufficiently strong (λ^T high) and her aversion to inter-issue ideological inconsistency is sufficiently weak (λ^N low). This observation suggests that an exclusive focus on differences in means – a focus implicit in some versions of expertise and slack minimization theories – may lead to incorrect predictions concerning legislative preferences.

The fourth basic comparative static result is that lengthening the shadow of the future (δ) makes agency delegation relatively more desirable. This effect arises for two reasons. First, the advantages of diversifying inter-temporal risk, which the agency does more effectively than the court, are greater when future periods are heavily weighted. Second, a high inter-temporal discount parameter means the legislator cares more about the inter-issue inconsistency costs that are realized in future periods. Due to the parallel

functional forms, these results are directly applicable to inter-issue discounting (α). Heavy discounting of less important issues (α low) makes delegation to courts relatively less appealing because (1) the legislative interest in inter-issue risk diversification is weaker; and (2) the legislator doesn't care much about inter-temporal consistency for the less important issues.

The next comparative statics concern the inter-temporal correlation between agency decisions (ρ_A^T) and the inter-issue correlation between court decisions (ρ_C^N). Increases in the correlation of agency decisions across time, which can be thought of as increases in agency inertia, make agency delegation more attractive if, but only if,

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

This condition is more likely to be satisfied if the legislator places a high value on inter-temporal consistency, if expected agency policy is bad for the legislator, and if future time periods are heavily discounted. Similarly, increases in the ideological consistency of judicial decisions across issues makes agency delegation more attractive if, but only if,

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

This condition is more likely to be satisfied when the legislator does not heavily discount less important issues, cares relatively little about consistency across issues, and expects generally favorable judicial decisions.

Relaxing the assumptions of perfect stare decisis ($\rho_C^T = 1$) and perfect agency centralization ($\rho_A^N = 1$), yield qualitatively similar results. Weakening stare decisis (decreasing ρ_C^T) makes agency delegation more attractive if:

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

Equation (7) is more likely to be satisfied if the legislator places a high value on inter-temporal consistency (λ^T high), when the legislator discounts the future heavily (δ low),

and when the expected loss from judicial decisions is substantial (μ_C high). These qualitative results parallel the results for increasing the inter-temporal consistency of agency decisions (ρ_A^T). Similarly, allowing greater ideological variance between agency decisions within a given time period (decreasing ρ_A^N) increases the appeal of agency delegation if:

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

Equation (8) is more likely to hold when the legislator places a low value on inter-issue 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 what is perhaps the central trade-off with regard to the role of uncertainty in the legislative choice between court and agency delegation. Court decisions vary across issues but are stable across time, while agency decisions are stable across issues but vary across time. Increasing variability along either of these two dimensions diversifies risk but entails inconsistency costs. Thus, delegation to agencies purchases inter-temporal risk diversification and inter-issue consistency at the price of inter-temporal inconsistency and a lack of risk diversification across issues. Delegation to courts involves the opposite trade-off. The question then becomes whether we can say anything – either at a high level of generality or with regard to specific issues – about what real-world factors are associated with one or the other side of this equation.

III. DISCUSSION

I consider five sets of variables that may influence legislative preferences for agency or court delegation: (1) the nature of the substantive policy problem; (2) legislators' political incentives, including interest group pressure; (3) characteristics of judicial statutory interpretation; (4) characteristics of agency statutory interpretation; and (5) 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 development a more comprehensive theory that synthesizes expertise, slack minimization, and blame deflection/credit claiming along with variance and uncertainty, and that incorporates a richer, more nuanced understanding of institutional differences between agencies and courts.

1. The nature of the regulatory problem

Legislative preferences regarding the choice between agencies and courts will be influenced by characteristics of the substantive issue that the statutory scheme is meant to address. While there are many possible ways the underlying policy issue might affect legislative preferences, three seem particularly salient: (1) the relative importance of inter-issue and inter-temporal consistency in a specific context; (2) whether the statute addresses a long-term or short-term problem; and (3) whether addressing this problem requires resolving a handful of very important interpretive issues or instead requires addressing many interpretive questions of roughly similar importance. A closely related question is (4) whether the scope of delegated authority is broad or narrow.

Consistency interests. The legislative interest in inter-temporal consistency (λ^T) is likely strong when a legislator's constituents must make large, irreversible investments. This favors delegating to courts unless agencies develop institutional mechanisms to make their decisions more stable over time (i.e., increasing ρ_A^T). Where inter-temporal risk diversification concerns are more salient than inter-temporal consistency interests, as will be the case when changes in interpretation over time do not impose substantial switching costs, agency delegation is more appealing. A similar logic applies to the trade-off between inter-issue consistency and inter-issue risk diversification. Inter-issue consistency is likely to matter a lot (λ^N high) when there are strong positive or negative synergies between discrete issues. For example, statutes that create complex incentive schemes or that address regulatory problems entailing significant risk-risk or health-

health trade-offs[57] may benefit from interpretations of different provisions that reflect 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. By a similar logic, a legislator 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.[58] Where costs of inter-issue or inter-jurisdictional inconsistency are low, however, the heterogeneity of court decisions may be an advantage rather than a disadvantage because it diversifies inter-issue or inter-jurisdiction risk.

The shadow of the future. Regulatory policy areas differ not only with respect to the strength of the legislative interests in inter-temporal and inter-issue 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 – air pollution, labor relations, abortion policy, financial regulation, etc. Other statutes are targeted more short-term problems, like allocating emergency aid to airlines in the wake of the 9/11 attacks[59] or determining liability for the costs of addressing the "millennium bug."[60] Whether a particular individual or organization qualifies for a license or regulatory exemption is also likely to be an issue with 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 legislator's interest in how issues are resolved in future periods (δ) correlates positively with her preference for agency delegation, she is more

[57] *See* Cass Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996); W. Kip Viscusi, *Risk-Risk Analysis*, J. RISK & UNCERTAINTY 5 (1994).
[58] 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.
[59] *See* Air Transportation Safety and System Stabilization Act, 49 U.S.C. §40101 et seq.
[60] *See* Year 2000 Readiness and Responsibility Act, 15 U.S.C. §6601 et seq.

likely to prefer agency delegation for statutes that address long-lived issues than for those that deal with short-term problems.

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 of the 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.[61] Such policy areas may be characterized, in the model's terms, as ones in which less important issues are heavily discounted (α low), which implies a preference for delegation to agencies rather than courts.[62] By contrast, statutes that require application of general standards to the facts of particular cases on a more individualized basis – for example, anti-fraud laws[63] or licensing schemes that that involve application of a subjective standard like "public interest"[64] – would tend to favor delegation to courts because they implicate a relatively larger number of discrete interpretive issues of roughly comparable importance.

The scope of delegation. The degree to which the legislator discounts future periods (δ) and less important issues (α) are 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 that for a statute of indefinite duration, making the former associated with delegation to courts and the latter with delegation to agencies.[65] 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 policy-making power might imply a large number of issues that have roughly similar

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[61] *See* Louis Kaplow, *Rules and Standards: An Economic Analysis*, 42 DUKE L.J. 557, 573, 622 (1992).
[62] 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.
[63] *See* Kaplow, *supra* note 61 at 618-19.
[64] *See, e.g.*, Communications Act, 47 U.S.C. §303.
[65] For a more general discussion of how sunset clauses and related provisions influence legislative incentives, see Jacob Gersen, "Temporary Legislation" (2005) [manuscript on file with author].

importance (α high). This suggests, all else equal, that legislators are more likely to favor court delegation when a statute delegates broadly, while narrow delegations lend themselves to a preference for agency delegation. 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 inter-temporal 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 those that delegate a decision on a small number of short-lived issues.

2. Incentives of legislators and their constituents

Legislators' incentives are shaped not only by the nature of the substantive policy issue, but also by their institutional position and electoral constraints. Consider two such factors: (1) whether legislators and/or influential interest groups have narrow, parochial interests or broad, encompassing interests; and (2) whether legislators and interest groups have short or long time horizons.

Encompassing v. narrow interests. Legislators may perceive the relative difference in importance between issues as high (α low) even when a statute delegates a

large number of questions that would appear similarly important to an "objective" observer. For example, legislators may focus only on the subset of statutory provisions that directly affect their districts. And in some contexts, the dynamics of political organizing favor groups with narrow, specific interests over groups with broader interests.[66] If, for these or other reasons, legislators substantially discount less important issues, 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 of them perceives a relatively high 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 inter-temporal risk on the handful of issues or jurisdictions each legislator really cares about.[67] 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 lots of issues (α high), they have a stronger interest in delegating to courts, which can diversity their inter-issue risk more effectively.

Short-term v. long-term perspective. Different legislators and interest groups may assign different values to future periods not only because of the nature of the longevity of the underlying policy issue, but also because of political or institutional considerations.

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[66] *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS (1982); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1972).

[67] 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 inter-issue ideological consistency. This would tend to make agency delegation *less* attractive. *See supra* note 54.

If legislators care more about getting good results while they are still in office, then 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. This implies the potentially intriguing result that a stronger incumbency advantage correlates positively with legislative support for agency delegation. One may make a similar set of observations regarding the time horizons of interest groups. Long-lived groups – including the major political parties, to the extent that they pursue a substantive agenda 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, i.e. single-firm/single-industry lobbyists or single-issue advocacy groups. For these actors, inter-temporal risk diversification is more important than inter-issue risk diversification, and maintaining inter-issue consistency in future time periods is more important than maintaining inter-temporal consistency on plethora of unimportant issues. The preferences of large, broad-based advocacy groups are more ambiguous because such groups care about lots of issues (α high) and care a great deal about the future (δ high). Likewise, it is hard to make predictions about the preferences of senior party leaders or other legislators who are both politically secure and relatively more focused on broad national and/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 secure legislators and institutionalized interest groups is viewed as a

pathology to be resisted, the amount of agency delegation in the current system may be excessive. A more sanguine view sees benefits to a system in which legislators and interest groups can diversify inter-temporal 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.

3. Characteristics of judicial statutory interpretation

Consider three characteristics of the judiciary that might affect its appeal to legislators: (1) ideological diversity on the bench; (2) the degree to which the Supreme Court exercises centralized control; and (3) 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, if an increase in "diversity" changes the proportional representation of different ideological views on the bench, it will shift the expected dissatisfaction with judicial interpretation (μ_C). Whether this development makes delegation to courts more or less attractive to a given legislator (i.e., 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). Because this exacerbates inter-temporal risk costs and increases the amount of inter-issue 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. Viewed in this light, 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 decision-making units, not individual judges. When cases are decided by multi-judge panels, and when there are multiple pools from which panels are selected (e.g. circuits), increasing ideological variance at the judge level may sometimes decrease ideological variance at the panel level. This would be the case if intra-panel diversity has moderating tendencies,[68] and if the increase the ideological diversity *within* different circuits reduced the differences in the proportional representation of different ideologies *across* different circuits.[69]

The distribution of judicial ideologies across circuits is not the only determinant of the ideological variance of judicial decisions. Also relevant is whether one circuit has exclusive jurisdiction[70] or whether a case may be brought in any court.[71] Exclusive jurisdiction is likely to reduce the ideological variance of judicial decisions (σ_C), 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 is low. If, however, litigation over a given statute would otherwise tend to wind up in an ideologically homogeneous circuit, exclusive jurisdiction in an ideologically diverse

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[68] *See* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); 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 (1998).

[69] To illustrate, imagine a system in which there are two circuits, A and B. Circuit A has two liberal judges and one moderate, while 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 inter-circuit variance, since each circuit would be pulled toward the center. This suggests inter-circuit homogeneity coupled with intra-circuit diversity makes delegating to courts more attractive to legislatures, while intra-circuit homogeneity coupled with inter-circuit diversity makes courts less attractive.

[70] For example, the D.C. Circuit has exclusive jurisdiction over some issues, *see, e.g.*, Clean Air Act, 42 U.S.C. §7607(b); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a), while the Federal Circuit has exclusive jurisdiction over others, *see* Federal Courts Improvement Act, 28 U.S.C. §1295(a)(1).

[71] 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.

circuit may increase the ideological variance of court decisions, making delegation to the judiciary less attractive.

Supreme Court supervision. The constraint imposed on lower courts by Supreme Court review might affect both the mean (μ_C) and variance (σ_C) of judicial interpretations.[72] A stronger Supreme Court constraint may move the mean, which has an ambiguous effect on legislative preferences. A stronger constraint will also 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 lower 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[73] – agency delegation (or lodging exclusive jurisdiction in a particular circuit) becomes more appealing to legislators.

Stare decisis. While the basic model assumed 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 when Congress delegates courts broad powers to flesh out a statute's meaning in a common law fashion[74] or if Congress were to abrogate stare decisis by statute.[75] 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 inter-temporal consistency (λ^T high) and/or future periods (δ high),

[72] This constraint is jointly determined by how aggressively and extensively the Supreme Court reviews lower court statutory interpretations, and by how much 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.

[73] *See* Peter A. 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 (1987).

[74] *See supra* note 12 (discussing Sherman Act).

[75] *See* Rosenkranz, *supra* note 51 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 (2000).

since weakening stare decisis makes courts better at diversifying inter-temporal risk but exacerbates the inter-temporal inconsistency of court decisions. This result, which is another manifestation of the basic trade-off between inconsistency costs and risk costs, suggests that, where legislators have delegated courts interpretive authority on long-lived issues, the stare decisis norm is likely 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 supervision by the Supreme Court. Unless inter-temporal consistency is very important, the appeal of judicial delegation is further reduced if courts adhere to a strong stare decisis norm. This suggests the hypothesis 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 declining ability of the Supreme Court to exercise centralized control. 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 inter-temporal 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.

4. Characteristics of agency statutory interpretation

Consider three institutional/contextual characteristics of agencies that shape the probability distribution associated with agency decision-making: (1) whether the agency is an executive branch agency or an independent commission; (2) the degree of centralized presidential oversight; and (3) the amount of political polarization, i.e. ideological divergence between the main political competitors on the relevant issues.

Executive agencies v. independent commissions. The most basic institutional distinction to draw with respect to types of federal administrative agencies is between

executive branch agencies and independent commissions. The former are under the control of the President, while the latter are generally governed by bipartisan boards over which the President has only limited removal power.[76] Compared to executive agencies, decisions by independent commissions are 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 inter-temporal 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 inter-temporal consistency is unimportant and the shadow of the future is long, commissions are less attractive than executive agencies.

It may be that independent commissions, by virtue of their insulation from the President, may also display less ideological consistency across issues. If this is so, delegation to commissions is appealing when the interest in inter-issue risk diversification is strong (α high) and the interest in inter-issue consistency is weak (λ^N low). This prediction must be treated with caution, however, as 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.

Presidential supervision. The assumptions that, for administrative agencies, inter-issue consistency is perfect ($\rho_A^N = 1$) and inter-temporal 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,[77] is neither inevitable nor universal.

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[76] *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 (1926) (affirming President's plenary removal power with respect to executive agency heads) with *Huphrey's Executor v. United States*, 295 U.S. 602 (1935) (recognizing limits on President's power to remove heads of independent commissions).

[77] For arguments that the American public administration is currently characterized by strong presidential control, see *supra* note 29.

When these assumptions do not hold, executive branch agencies bear a stronger resemblance to independent commissions as described in the preceding subsection. Mechanisms that strengthen centralized presidential control – for example, regulatory review by the Office of Management and Budget or expanded use of presidential directive authority[78] – 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 inter-temporal risk diversification and inter-issue consistency, but less attractive to legislators who value inter-issue risk diversification and inter-temporal consistency.

Political polarization. As parties become more politically polarized – more specifically, when their expected attitudes toward the relevant statutory issue move further apart – the variance of agency decisions (σ_A) increases, making agency delegation less attractive.[79] When competitors for executive power "race to the center," or when the relevant set of interpretive issues are basically technocratic and non-partisan, such variance is likely to be lower, making agency delegation more attractive. An important qualification: The same underlying political polarization that increases the variance of agency decisions (σ_A) may also increase the variance of judicial decisions (σ_C). Thus, a more accurate statement of the hypothesis is that agency delegation is less likely on issues where politicians have sharply divergent views but courts are less divided.

Summary. Legislators who care about inter-temporal risk diversification and inter-issue consistency, but not inter-issue risk diversification or inter-temporal consistency, are more partial to executive agencies subject to centralized presidential control. By contrast, legislators interested in inter-issue risk diversification and inter-temporal consistency are more likely to favor agency delegation if the agency operates with some degree of autonomy from the President. In general, rational legislators are less

[78] *See* Kagan, *supra* note 29 at 2277-90.
[79] To clarify, I assume here that polarization does not affect the location of the ideological mid-point between the two parties, i.e. increased polarization does not affect μ_A.

likely to favor agency delegation when executive branch agencies must make decisions on policy controversies that polarize political parties much more than they do judges.

5. 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 court plays no role. The justification for this simplifying assumption is that, under prevailing *Chevron* doctrine, courts are quite deferential to agency interpretations of ambiguous statutes,[80] as well as to other agency exercises of delegated power.[81] But courts do review agency decisions, sometimes aggressively,[82] 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 the court to "substitute its judgment for that of the agency"[83] – will reduce any difference between judicial and agency interpretation. In the presence of such aggressive review, the choice between agencies and courts is not much of a choice at all, and most of the other substantive hypotheses developed from inspection of the model would cease to hold. 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 would force the agency to demonstrate "reasoned decisionmaking."[84] If such a requirement

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[80] Though the actual impact of *Chevron* is the subject of some empirical debate, most evidence to date suggests that is has resulted in greater deference by lower courts to agency decisions. *See* Aaron P. Avila, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L. J. 398 (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. REG 1 (1998); Peter H. Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984. *But see* Merrill, *supra* note 22 at 980-85.

[81] *See* Dickinson v. Zurko, 527 U.S. 150, 162 (2000); Marsh v. Or. Nat. Resources Def. Council, 490 U.S. 360, 375-78 (1990); Heckler v. Chaney, 470 U.S. 821 (1985).

[82] *See, e.g.*, Cross, *supra* note 23; MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1988); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

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

[84] *Id*. at 52.

makes policy change more costly, it will increase the inter-temporal consistency of agency decisions (ρ_A^T). Judicial review of this sort would increase the appeal of delegating to agencies if inter-temporal consistency is more important than inter-temporal risk-diversification, but would make agency delegation less attractive if risk diversification is the more salient concern. A similar effect obtains if courts treat divergence from longstanding agency practice as a reason to give agency interpretations less deference.[85]

CONCLUSION

Legislators who delegate their authority 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 paper explores some of the factors that may influence this choice, focusing in particular on a rational, risk-averse legislator's interests in maintaining ideological consistency and diversifying ideological risks. The formal model explores the implications of this trade-off, and also focuses attention on the fact that the legislator confronts this trade-off 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, a 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.

[85] *Compare* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (suggesting that departure from past practice may justify less deference) *with* Rust v. Sullivan, 500 U.S. 173 (1991) (indicating that deference is due even when agency statutory interpretations change).

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 policy-making process like legislative oversight. This paper should therefore be read as a contribution to a larger project, not as a brief advocating the primacy of one set of explanatory variables. That said, the influences on legislative preferences I analyze in this paper 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.